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SUPREME COURT of the UNITED STATES.

October Term, 1904.

No. 244.

GUS G. COULTER,
S. W. HAGER and
C. B. HILL, - - - - APPELLANTS,

VERSUS

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY - APPELLEE.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

BRIEF FOR APPELLANTS.

NAPOLEON B. HAYS,
Attorney General,
WILLIAM O. DAVIS,
HENRY L. STONE,
Counsel for Appellants.

POINTS AND AUTHORITIES.

I.

THE CIRCUIT COURT HAD NO JURISDICTION OF THIS ACTION.

1. It appears from the bill that the State board had made the final assessment of appellee's franchise, and the auditor had given appellee the statutory notice thereof, and it is not shown by the bill that appellants, being the auditor, treasurer, and secretary of State, constituting said board, had any further statutory power or authority to enforce the collection of the unpaid part of the State taxes on said assessment. Hence, appellee's suit was against the State without its consent, and in violation of the Eleventh Amendment to the Constitution of the United States, and the demurrer to the bill for want of jurisdiction should have been sustained, and the bill dismissed without regard to the merits, so far as State taxes were concerned.

Louisiana vs. Jumel, 107 U. S. 711.
Ex parte Ayers, 123 U. S. 443.
Hans vs. State of Louisiana, 134 U. S. 1.
Coulter, Auditor, vs. Weir, 127 Fed. Rep. 897.

2. The bill alleges that the amount in controversy in this action, without considering the local taxes, exceeds, exclusive of interest and costs, the sum of $2,000, but there is no allegation stating the amount or value of the local taxes due the counties, cities, towns, and taxing districts on the franchise assessment sought to be enjoined, and it can not be discovered from the bill as amended whether or not such local taxes involved herein, exclusive of interest and costs, exceed the sum of $2,000. The demurrer to the bill for want of jurisdiction should have been likewise sustained, so far as local taxes were concerned, the necessary jurisdictional amount thereof not being alleged.

Walter vs. Northwestern Railroad Co., 147 U. S. 370.
Fishback vs. Western Union Telegraph Co., 161 U. S. 96.
Coulter, Auditor, vs. Fargo, 127 Fed. Rep. 912.

3. There being no diverse citizenship between the parties, the bill does not show jurisdiction in the Circuit Court, on account of the alleged denial of the equal protection of the laws within the

meaning of the Fourteenth Amendment to the Constitution of the United States.

Nashville, Chattanooga & St. Louis Railway vs. Taylor, 86 Fed. Rep. 168.

Railroad and Telephone Companies vs. Board of Equalization of Tennessee, 85 Fed. Rep. 302.

Taylor vs. Louisville & Nashville Railroad Co., 88 Fed. Rep. 350.

Louisville Trust Co. vs. Stone, Auditor, 107 Fed. Rep. 305.

Cummings vs. Merchants National Bank, 101 U. S. 153.

Albuquerque National Bank vs. Perea, 147 U. S. 87.

II.

THE PROOF SHOWS THE ASSESSMENT OF APPELLEE'S FRANCHISE HAD BECOME FINAL BEFORE THIS ACTION WAS INSTITUTED.

Coulter's Deposition, R. 76; Exhibit No. 6, R. 491; Exhibit No. 4, R. 488-489.

III.

THE BILL AS AMENDED DOES NOT STATE FACTS SUFFICIENT TO ENTITLE COMPLAINANT TO ANY RELIEF IN EQUITY.

1. It is not alleged in the original bill that the members of the Board of Equalization in 1902 habitually, systematically, intentionally or fraudulently equalized property subject to equalization by said board, at less than its fair cash value, nor is it alleged in the amended bill that the county assessors for that year habitually, systematically, intentionally or fraudulently assessed the property of individuals and corporations, not required by law to report to the Board of Valuation and Assessment, below its fair cash value. The allegation in the amended bill that said assessors "uniformly" assessed such property below its value for the year 1902 is not sufficient to bring this case within the rule announced in this class of cases by the Federal courts.

Cummings vs. Merchants National Bank, 101 U. S. 153.

Taylor vs. Louisville & Nashville Railroad Co., 88 Fed. Rep. 350.

German National Bank vs. Kimball, 103 U. S. 732.

Pelton vs. Commercial National Bank, 101 U. S. 143.

Albuquerque National Bank vs. Perea, 147 U. S. 87.

New York *ex rel.* vs. Barker, 179 U. S. 190.

State *ex rel.* vs. Western Union Telegraph Co., 165 Mo. 504.

Western Union Telegraph Co. vs. Missouri, 187 U. S. 412-17.

Exchange National Bank vs. Miller, 19 Fed. Rep. 372.

2. The bill is without equity, because no payment or tender is alleged to have been made to the counties, cities, towns, and districts of the taxes due them for the year 1902, upon so much of the assessment of complainant's franchise as is conceded to be correct, the amount of which local taxes complainant could have ascertained, the levies being matters of record, and the mileage of complainant's lines in all these subdivisions being known to complainant from its own records and reports, as well as from the official reports of the Railroad Commission.

Illinois Railroad Tax Cases, 92 U. S. 575.
German National Bank vs. Kimball, 103 U. S. 732-35.
Albuquerque National Bank vs. Perea, 147 U. S. 87-90.
Northern Pacific Railroad Co. vs. Clark, 153 U. S. 252.

IV.

THE COUNTY ASSESSORS DID NOT HABITUALLY AND INTENTIONALLY NOR FRAUDULENTLY ASSESS THE PROPERTY OF INDIVIDUALS AND CORPORATIONS, NOT REQUIRED TO REPORT TO THE BOARD OF VALUATION AND ASSESSMENT, AT LESS THAN ITS FAIR CASH VALUE; NOR DID THE BOARD OF EQUALIZATION INTENTIONALLY OR FRAUDULENTLY EQUALIZE THE ASSESSMENTS OF SUCH PROPERTY SUBJECT TO EQUALIZATION ON THE BASIS OF 80 PER CENT. OF ITS CASH VALUE FOR THE YEAR 1902.

1. If the court shall conclude that the allegations of the bill are sufficient to give jurisdiction to the Circuit Court, and to constitute a cause of action, then the proof falls short of what is required by the decisions of the Federal courts in this class of cases before an injunction will be granted interfering with the collection of the public revenues of a State.

Trustees Cincinnati Southern Railway vs. Guenther, 19 Fed. Rep. 398.
Taylor vs. Louisville & Nashville Railroad Co., 88 Fed. Rep. 373-74.
New York *ex rel.* vs. Barker, 179 U. S. 286.

2. If there was any actual discrimination between the assessments of property by the local assessing authorities as equalized, and those of appellee's franchise, it was sporadic, and not designed or intentional.

3. The presumption must be indulged by the court that the sworn assessing officers discharged their duties faithfully and as required by law, until the contrary is clearly shown by a preponderance of the competent and relevant evidence.

4. An action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal, and it can not be justified except on the ground of an obvious violation of law or something equivalent to fraud.

5. The court can not take judicial notice of undervaluations of any species of property, if any there be, by assessing officers.
New York *ex rel.* vs. Barker, 179 U. S. 286.

6. The preponderance of the competent evidence introduced by the parties is overwhelming that the local assessors and the State Board of Equalization endeavored in good faith to the best of their ability and judgment to assess and equalize all property coming under their jurisdiction at its fair cash value. If they made a mistake or failed to accomplish this purpose, there was no systematic or intentional discrimination made by said officers against appellee.

7. The Board of Equalization did not in 1902 intentionally equalize the assessments made by the county assessors on the basis of less than the fair cash value of the property assessed. In the little use that was made of the *transfer* values certified by the county clerks, the members of said board, by taking 80 per cent. thereof, aimed in good faith, and in connection with the oral testimony of witnesses and other evidence, to reach the fair *cash* value of farm lands and town lots in the several counties. If they erred in that respect, or thus failed to obtain such cash value, it does not follow that there was any unlawful or fraudulent discrimination against appellee, especially where said board increased the assessments made for that year more than eleven million dollars over those for the preceding year.

8. Although the 70 per cent. provision was contained in the act of 1888 (Sec. 4274, Kentucky Statutes), neither that nor any rule of equalizing assessments on a basis of less than the constitutional standard, the fair cash value, was acted upon by the Board of Equalization in 1902, as six out of the seven regular members of said board (the other being ill and unable to attend its sessions) positively and unequivocally testified.

9. The affidavits and documents taken in 1898 and filed as evidence for complainant in the case of *Louisville Trust Co. vs. Stone, Auditor, 107 Fed. Rep. 305*, and afterward withdrawn and,

over appellants' objection, filed as evidence for appellee in the case at bar, was held to be insufficient to authorize the injunction prayed for in the former case on the alleged ground that the complainant had been denied the equal protection of the laws by the assessments for the years 1897 and 1898, and the same evidence, even if competent or relevant, was insufficient to support the application for an injunction on the same ground in this case.

10. The learned judge of the Circuit Court assumed that the assessments of property by the local assessors in 1891 were made and equalized on a basis of 70 per cent. of cash value, and because those for 1902 were not as much as 30 per cent. more, erroneously held that the latter assessments showed there was systematic, habitual, intentional or fraudulent undervaluation. He admits, however, the assessments for 1897 and 1898 were upheld as valid and not violative of the rights of the complainant in the case of *Louisville Trust Co. vs. Stone, Auditor, supra*, and "as to the years 1899-1900-1901 there is *no* evidence directly bearing thereon, as to how, relative to value, said property was assessed, after equalization had," yet, with these five years immediately preceding 1902 excluded, he goes back *eleven* years to the year 1891 to institute a comparison between that year and the year in controversy, in order to reach his conclusion. Had he taken either the assessments for 1897 or 1898 as having been made at *cash* value, which he should have done after the controlling decision in the *Louisville Trust Co. case*, and compared the same with those of 1902, his conclusion would have been different, for an increase in the latter year over 1897 would have been shown of forty-nine millions, or 9 per cent., in five years, and over 1898 of forty-five millions, or 8 per cent., in four years, in the total equalized value of all property in the State assessed by the local assessors.

11. The *intangible* property of individuals and all corporations not required to report to the Board of Valuation and Assessment, is assessed by the local assessors, and such assessments are not subject to equalization by the Board of Equalization. There is no proof that such intangible property was undervalued. The lands and other *tangible* property of railroad companies are assessed by the Railroad Commission, and there is no allegation or proof that said commission valued the same at a higher valuation than the lands and tangible property of individuals and other corporations not required to report to the Board of Valuation and Assessment, were valued at by the local assessors. Hence, it does not appear from the record that the appellee was discriminated against in the separate assessment of either its tangible or intangible property, or that either of these classes of its property was assessed at a

higher valuation than was placed on the same class of property owned by individuals and other corporations not required to report to the Board of Valuation and Assessment.

12. Appellants' exceptions to the testimony, described therein, offered in evidence by appellee, because the same was incompetent, irrelevant, and hearsay, and on which the decree appealed from was mainly founded, should not have been overruled, but sustained, and such testimony disregarded by the court below.

V.

THE FRANCHISE OR INTANGIBLE PROPERTY OF THE COMPLAINANT WAS NOT IN FACT ASSESSED BY THE BOARD OF VALUATION AND ASSESSMENT AT ITS FULL CASH VALUE, OR AT A SUM IN EXCESS OF 80 PER CENT. OF SUCH VALUE FOR 1902.

1. To ascertain the value of the franchise or intangible property of a public service corporation two methods have been followed by the Board of Valuation and Assessment, and approved by the courts, to wit: (1) the capitalization plan, whereby the total value of all the property of the corporation is fixed at a sum which at 6 per cent. will produce the amount of the net income or earnings; (2) the stock and bond plan, whereby the total value of all the property of the corporation is fixed at the market value of the shares of stock and bonds.

Henderson Bridge Co. vs. Commonwealth, 99 Ky. 641.
Louisville Railway Co. vs. Commonwealth, 105 Ky. 722.
Henderson Bridge Co. vs. Commonwealth, 166 U. S. 152.
Adams Express Co. vs. Kentucky, 166 U. S. 180.
State Railroad Tax Cases, 92 U. S. 575.
Commonwealth vs. Covington & Cincinnati Bridge Co., 70 S. W. 849.
Commonwealth vs. Covington & Cincinnati Bridge Co., 70 S. W. 849.
Western Union Telegraph Co. vs. Taggart, 163 U. S. 1.

Under either of these plans the value of the franchise or intangible property of the corporation may be ascertained by deducting from such total value the assessed value of its tangible property, the remainder being considered the value of its franchise or intangible property.

2. Following either the capitalization or the stock and bond plan, the final assessment of appellee's franchise for 1902 by the Board of Valuation and Assessment was less than 80 per cent. of its fair cash value.

3. The share of Kentucky in the assessment of appellee's property was more than 26 per cent., the percentage adopted by the Board of Valuation and Assessment, which erroneously included as a part of the lines of road that appellee "operated, owned, leased or controlled" in that State and elsewhere 1,044.21 miles of road belonging to other companies, in which appellee merely owned one-half or a majority of the shares of stock. The road of another company in which appellee owns a majority of the stock is not "controlled" by the appellee within the meaning of the statute.

Northern Securities Company Case, 120 Fed. 721.

Pullman Palace Car Company vs. Missouri Pacific Railway Company, 115 U. S. 587.

Porter, vs. Pittsburg, etc., Company, 120 U. S. 670.

American Preservers Company vs. Norris, 43 Fed. 714.

Exchange Bank vs. Macon, etc., Company, 97 Ga. 7; 33 L. R. A. 803.

Atchison, etc., Railway vs. Cochran, 43 Kan. 234; 19 Am. St. Rep. 131; 7 L. R. A. 418.

Louisville Gas Company vs. Kaufman, Straus & Co., 105 Ky. 131.

4. The Board of Valuation and Assessment further erroneously reduced Kentucky's share of the assessment of appellee's property by including in the total mileage of the lines "operated, owned, leased or controlled" by appellee in that State and elsewhere 624 miles of road belonging to a company where appellee was not the sole lessee, but only one of two joint lessees.

5. The auditor, in administering the revenue laws of Kentucky, required of appellee and all other railroad companies the State tax at the rate of only 47½ cents on each $100 of the assessed value of their franchises for the year 1902, while individuals and other corporations were required by him to pay the State tax at the rate of 50 cents on each $100 of the assessed value of all their property for the same year. This discrimination against the latter class of taxpayers in favor of railroad companies in the *rate* of taxation was equivalent to a reduction of 5 per cent., or 1-20 of the *assessment* of appellee's franchise, and reduced appellee's State tax for 1902 nearly $2,700.

VI.

THE COMPLAINANT, BY REASON OF THE ACTION OF THE COUNTY ASSESSORS AND BOARD OF EQUALIZATION OR THE BOARD OF VALUATION AND ASSESSMENT, HAS NOT BEEN DISCRIMINATED AGAINST OR DENIED THE EQUAL PROTECTION OF THE LAWS WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

King vs. Mullins, 171 U. S. 436.
Judson on Taxation, Sec. 437, p. 562.
Head Money Cases, 112 U. S. 595.
National Bank vs. Baltimore, 100 Fed. 27-28.
Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 233.
Merchants & Manufacturers Bank vs. Pennsylvania, 167 U. S. 464.
Columbus & Southern R. Co. vs. Wright, 151 U. S. 478.
Florida Central & P. R. Co. vs. Reynolds, 183 U. S. 476.
Kentucky Railroad cases, 115 U. S. 321.
Charlotte C. & A. R. Co. vs. Gibbes, 142 U. S. 386.
Wagoner vs. Loomis, 37 Ohio St. 571.
Lowell vs. County Commissioners, 152 Mass. 375.
Central Railroad Co. vs. State Board of Assessors, 48 N. J. L. 7.
Louisville Railway Co. vs. Commonwealth, 105 Ky. 710.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 244.

GUS G. COULTER ET AL., - - - - - - - - *Appellants*,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - - - - *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANTS.

STATEMENT.

This action was brought by the complainant and appellee, Louisville & Nashville Railroad Company, a corporation organized and existing under the laws of the State of Kentucky, and a citizen and resident thereof, July 2, 1902, against the defendants and appellants, Gus G. Coulter, auditor, S. W. Hager, treasurer, and C. B. Hill, secretary of State, constituting the Board of Valuation and Assessment of the State of Kentucky, to enjoin the apportionment by said board of the final assessment of complainant's franchise for the year 1902 to the extent of $6,757,745.14, among the several counties, municipalities and taxing districts through or into which the lines of the appellee run, and the certification by the appellant, Coulter, as auditor, of such apportionment to the County Court clerks of such counties as required by the revenue statute of November 11, 1892, the sections of which, bearing on this subject, are made part of appellee's bill. (R., 2-13.) It is alleged in the bill that the value of the assets of the complainant in the State of Kentucky for the year 1902 was fixed by said board at the sum of $33,788,724.50; that this was intended by said board to be the full value of all the assets of the complainant in the State of Kentucky, and that said sum is, in fact, the full value of all the assets of the complainant in said State. It is further

alleged that within the thirty days after receiving notice of the assessment appellee appeared before said board and showed cause against the same, and among other things the complainant insisted that its property should not be assessed above the general level of values fixed for all other property in said State, except the property of those corporations required to report to the said board; that complainant showed to said board that the property of all citizens and corporations who are not required to report to said board had been equalized on the basis of not over 80 per cent. of its cash value, whereas it is alleged that complainant's property is assessed certainly at its full value, and it is thus made to bear an undue proportion of the burdens of the State government, and is denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States. In the bill it is further alleged that the railroad commissioners assessed complainant's tangible property for the year 1901 at $23,013,825, which said board deducted from the value of the complainant's assets in Kentucky as fixed by it, amounting to $33,788,724.50, and set down the difference, to wit: $10,774,899.50, as the value of complainant's franchise in this State, which is alleged to be nearly twice as much as the average assessment of complainant's franchise in Kentucky for the last six years, which was less than $5,500,000, though the property of complainant in Kentucky now is the same property and of the same value that it had been for the previous six years; that during said period the assessed value of all the property in said State belonging to individuals and corporations not required to report to said board has increased about 3 per cent., while the assessed value of complainant's property, which is alleged to have not changed substantially in value during that period, and which, it is alleged, has always been assessed at its full value, has been increased over 30 per cent. Under these alleged facts, the complainant insists that it is entitled to have the assessed value of all of its property in Kentucky, as fixed by said board, decreased by at least 20 per cent.; in other words, that it is entitled to have the assessed value of all of its property in Kentucky fixed at not exceeding $27,030,979.66.

According to the averments of the bill, it will be seen by the court that when the admitted value of the complainant's tangible property as assessed by the Railroad Commission is deducted from the latter sum, there is left only $4,017,154.66, which complainant contends should have been fixed as the assessed value of its franchise in Kentucky for the year 1902. This latter sum deducted from $10,774,899.50, the amount of the actual assessment made by said board of complainant's franchise for 1902, leaves $6,757,745.14 as the amount of said franchise assessment which complainant seeks to have the court enjoin said board from apportioning and said auditor from certifying as aforesaid. In other words, the object of this action is to have the court prevent,

by injunction, the State from collecting its taxes on said *final* assessment, and the apportionment and certification, as aforesaid, of $6,757,745.14, or 20 per cent. of $33,788,724.50, the amount fixed as the assessed value of complainant's assets or property in the State of Kentucky.

The complainant further alleges that it has paid to the State on its taxes $19,082.38, which is the amount it conceives to be due to the State, which sum had been received, but not as payment in full, and that said board insists upon its right to make, and it will make, the alleged tentative assessment of the complainant's franchise final, which said board has *declined* to reduce as requested by complainant, and unless said board is restrained by the order of the court, it will make said assessment final and certify the same to the county clerk in each county, into or through which any part of the complainant's lines passes, in order that the local authorities of such counties, cities, towns, and taxing districts, through or into which complainant's lines run, may also collect the taxes claimed by them, based upon such alleged excessive valuation of complainant's franchise, and that complainant's road or some part of its lines extends into or through fifty-four counties in the State of Kentucky.

It is further alleged that the difference between the amount tendered and paid by complainant, and the amount of the State tax on said assessment is $32,098.79, without considering the local taxes, and that the amount involved herein, therefore, far exceeds, exclusive of interest and costs, the sum of $2,000; that if said board be not restrained from making said assessment final, and the auditor be not restrained from certifying the same to the various counties, municipalities, and taxing districts in the State of Kentucky, through or into which its line passes, it will be claimed by the State authorities, as well as the local authorities, that complainant will become liable to pay, thirty days after receiving the final notice provided for in said act, a penalty of 10 per cent. of the amount of tax and interest at the rate of 10 per cent. per annum and a fine of $50 a day for each day the same remains unpaid.

It is further alleged by the complainant that it has no adequate remedy at law, because, if it pays the full amount of the assessment to the State, it can not recover it back, as it is not permitted under the law to sue the State, and it will be subjected to innumerable suits or special proceedings, with a view to subjecting its property in every county, city, and taxing district, through or into which its road passes, and they will endeavor to collect said taxes from complainant either by suit, distraint, or attachment, and complainant will be thus subjected to the great annoyance, cost, and injury of these numerous suits and proceedings, and that unless defendants are enjoined and restrained from making said assessment final, except as they reduce the same as indicated in

complainant's bill, that is, to 80 per cent. of the value fixed, the result will be that complainant will be improperly and unlawfully harassed and irreparably injured by attempts to collect taxes upon the alleged excessive assessment.

Upon the filing of this bill, and in pursuance of the prayer therein, the court entered a restraining order against the defendants, enjoining and restraining them from assessing, and the defendant, Coulter, as auditor, aforesaid, from certifying any assessment of complainant's property in Kentucky at a sum exceeding $27,030,979.66 for the year 1902 until the hearing of the complainant's application for a writ of injunction and the further order of the court in the premises. (R., 13-14.) This restraining order remained in force until the final decree.

On November 18, 1902, the day set for the hearing of complainant's application for a preliminary injunction, the complainant tendered and was permitted to file an amended bill, in which it was alleged (R., 18-19) that all of the property of individuals and corporations not required by law to report to the Board of Valuation and Assessment, was assessed by the various county assessors, who, it is alleged, uniformly assessed said property below its value, and in many instances below 50 per cent. of its value, and in over 90 per cent. of the counties below 80 per cent. of its value, and in very few counties above 80 per cent. of its value; that, unless defendants were restrained by the order of the court, they would proceed to have the assessments made by them, as set out in the original bill, apportioned among the several counties, cities, towns, and taxing districts in the State, and the same would be certified by the auditor to the said several counties, cities, towns, and taxing districts, each of which would try to enforce, and unless restrained will enforce, the local taxes upon the assessments or values so certified, and the defendants and other proper officers of the State, unless restrained, will proceed to endeavor to collect the taxes upon the full amount of the assessment as alleged in the original bill, and that, up to the time of the filing of said amended bill, the apportionment had not been certified to the various counties, cities, towns, and taxing districts aforesaid, nor had there been any coercive steps taken by the State to collect the taxes upon the total assessment, but that these steps will be taken and the assessment as made will be certified as aforesaid unless the defendants are restrained therefrom; and in the prayer to this amended bill complainant prays for an injunction *pendente lite* against the defendants, commanding them to refrain from attempting in any way, or to any extent, to apportion or certify the said assessment, as made to the various counties, cities, towns, and taxing districts, and that defendants and all others acting for the State of Kentucky be commanded to refrain from taking any step whatever for the collection of taxes upon said alleged assessment, as well as for all such equitable relief as

upon the facts it may appear to the court the complainant is entitled to.

As will be seen by the order entered herein on the day last mentioned (R., 20-21), the defendants then filed their demurrer on these grounds: (1) That the bill fails to state facts sufficient to show jurisdiction in the court, and (2) that the bill does not contain any matter of equity whereon the court can grant any decree or give to the complainant any relief against the defendants, or either of them, which demurrer, by agreement of counsel, as shown by said order, applies to the bill as amended. By further stipulation in writing between counsel for complainant and defendants, the answer of the defendants was filed without waiving their said demurrer (R., 20), and the said amended bill stands controverted of record. (R., 785.)

By their said answer the defendants controverted the allegations of the several paragraphs of the complainant's original bill, except so much thereof as simply recites the provisions of the statute laws of the State of Kentucky concerning revenue and taxation. (R., 22-29.)

In addition to the denials contained in their answer, the defendants set up and rely on certain affirmative defenses, which may be briefly stated as follows:

In the fourth paragraph of the answer (R., 23-24) it is alleged that the defendant auditor, in administering the revenue laws of the State, has required of the complainant, and all other railroad corporations assessed upon their franchises, the payment of State taxes for the year 1902 at the rate of only forty-seven and one-half (47½) cents on each one hundred ($100) dollars of its assets, whereas he has required of all other corporations and individuals the payment of such taxes on the assessed value of other property for the same year at the rate of fifty (50) cents on each one hundred ($100) dollars, whereby a discrimination has been made in complainant's favor of 5 per cent. of the assessed value of its franchise in the year 1902.

In the fifth paragraph of defendants' answer (R., 24-25) it is admitted that the defendants, constituting the Board of Valuation and Assessment, fixed the value of complainant's assets or property, tangible and intangible, in Kentucky for the year 1902, at $33,788,724.58, but defendants deny that this sum was in fact the full value of all the assets of complainant in said State on September 15, 1901, the date as of which said assessment was made; or that after thirty days' notice had been given to complainant to appear and show cause against said assessment, the complainant showed any cause against the same; or that its property had been assessed above the general level of values fixed on all other property in the State except the property of those corporations required to report to said board, or that complainant showed to said board that the property of all citizens who are not required to report to

said board had been equalized on the basis of not over 80 per cent. of its cash value, or that the same had been equalized at any sum less than its fair cash value estimated at the price it would bring at a fair voluntary sale, or that complainant's property is or was assessed at its full value, or that it is thus or otherwise made to bear an undue proportion of the burdens of the State government, or is denied the equal protection of the laws.

In the same paragraph the defendants admit that the Railroad Commission of the State of Kentucky assessed complainant's property in said State for the year 1901 at $23,013,825, and that the Board of Valuation and Assessment for the year 1902 deducted that value from the value of the assets or property, tangible and intangible, of complainant in Kentucky as fixed by the latter board, amounting to $33,788,724.58, and assessed complainant's franchise or intangible property in said State, after making such deduction, at $10,774,899.58, and further admitted that it is true that the latter sum is nearly twice as much as the average assessment of complainant's franchise in Kentucky for the last six years, which was less than $5,500,000, but defendants denied that complainant's property in said State now, or when assessed for the year 1902, as of September 15, 1901, is the same property, or of the same value that it had been for the last six years, or that for that period, or any period, the assessed value of all the property in said State belonging to individuals and corporations not required to report to said board has increased only about 3 per cent., or that the assessed value of complainant's property has been increased as much as or over 30 per cent., or that complainant's property has not changed substantially in value during that period, or that it has always or at any time been assessed at its full value.

It is further alleged in this paragraph of defendants' answer that the defendants, constituting said board, fixed the tentative or preliminary assessment of complainant's franchise at $12,912,626, and after notice thereof complainant appeared and complained of said assessment, whereupon defendants reduced the same $2,137,727, or to the sum of $10,774,899, the final assessment complained of, which was made and apportioned by said board prior to the institution of this action.

In the seventh paragraph of defendant's answer (R., 26-28) it is alleged that complainant in making its report to the auditor of public accounts, required by the said act of November 11, 1892, as of September 15, 1901, reported that the length of the entire lines operated, owned, leased, or controlled by it in said State and elsewhere aggregated 5,317.76 miles, and that its lines operated, owned, leased, or controlled in said State aggregated 1,316.33 miles, whereas in truth and in fact the entire lines operated, owned, leased, or controlled by complainant in said State and elsewhere, on September 15, 1901, aggregated only 3,346.45 miles, and the lines operated, owned, leased, or controlled by complainant in said State

at that date aggregated only 1,194.04 miles, as shown by the report of the complainant to the auditor, for the use of the Railroad Commission of the State of Kentucky, as of July 1, 1901, and the defendants charged that there had been no change in the mileage of complainant's entire lines in said State and elsewhere, or in its mileage in said State between July 1, 1901, and September 15, 1901.

The defendants further alleged in the same paragraph of their answer that, upon complainant's said report concerning its mileage in said State and elsewhere the proportion of the assessed value of complainant's property in said State to the assessed value of its entire property in said State and elsewhere was fixed by said board at far less than it should have been in the assessment for the year 1902, the true proportion thereof in said State being then 35.68 per cent. of the entire value, whereas said board estimated the same on account of complainant's said report at only 26 per cent. of the value of complainant's entire property in said State and elsewhere; that in said report complainant reported its gross earnings and net earnings only upon its entire lines of road in said State and elsewhere, aggregating 3,346.45 miles of road, and said board had no knowledge or information before it, in making the assessment of complainant's franchise for 1902, concerning the gross earnings or net earnings of the complainant for the twelve months prior to September 15, 1901, other than as set forth in complainant's said report, which showed the amount of complainant's net earnings for the preceding year aggregated $9,278,289 upon its entire lines in said State and elsewhere, which were in fact 3,346.45 miles; that, under the usual rule employed by said board for ascertaining the value of the entire property of a corporation whose franchise or intangible property is subject to assessment by said board (which rule, it is alleged, has been approved as lawful and correct by the Court of Appeals of the State of Kentucky and this court), the value of the entire property of complainant as of September 15, 1901, was $154,638,150, a sum which at 6 per cent. per annum would produce $9,278,289, the amount of the net earnings aforesaid; that the share of the State of Kentucky in the value of complainant's entire property on the correct mileage basis aforesaid at 35.68 per cent. is $55,174,891, and deducting the value of complainant's tangible property in said State, $23,013,825, therefrom, the value of complainant's franchise, subject to taxation in said State for the year 1902, is $32,161,066; that even upon the erroneous and inaccurate mileage basis stated in complainant's said report, that is, 5,317.76 miles, as the entire length of the lines owned, leased, controlled, or operated by the complainant in said State and elsewhere, and 1,316.33 as the length of such lines in said State, the share of the State of Kentucky in $154,638,150, the value of complainant's entire property, ascertained as aforesaid, is $38,278,304, and deducting

therefrom $23,013,825, the value of complainant's tangible property assessed in said State, the value of complainant's franchise in the State of Kentucky is $15,264,479 for the year 1902; that in fixing the value of complainant's franchise, said board erroneously (being misled by complainant's said report concerning its mileage), fixed the share of the State of Kentucky in the value of complainant's entire property in said State and elsewhere at only 26 per cent. or 9.68 per cent. less than the same should have been fixed at, had the same been fixed upon the true and correct mileage basis; that, even upon the basis of 26 per cent., the share of the State of Kentucky in $154,638,150, the value of complainant's entire property in the State of Kentucky and elsewhere, ascertained as aforesaid, is $40,205,919, and deducting therefrom $23,013,825, the assessed value of complainant's tangible property in said State, the value of complainant's franchise in said State is $17,192,094, or $6,417,195 more than $10,774,889, the assessed value of complainant's franchise as fixed by said board for the year 1902, which assessment was only 62⅔ per cent. of the full or fair cash value of complainant's franchise on the basis of the usual rule aforesaid.

It is further alleged by the defendants in said paragraph of their answer, that the value of complainant's entire property on the basis of the value of its mortgage bonds and capital stock as of September 15, 1901, as shown by complainant's said report, was as follows:

The par value of complainant's mortgage bonds (deducting the amount of bonds claimed in said report), though then of greater cash value, was	$89,667,660
The par value of complainant's capital stock, though then of greater cash value, was	55,000,000
Total value	$144,667,660

And the defendants further allege that the share of the State of Kentucky in this total value, even on the basis of 26 per cent., as fixed by said board (though it is, in fact, 35.68 per cent.), is $37,613,591, and deducting therefrom $23,013,825, the assessed value of complainant's tangible property in said State, the value of complainant's franchise, or intangible property, in the State of Kentucky for the year 1902 is $14,599,766, of which the value of such franchise, as fixed by said board ($10,774,899), is less than 74 per cent.

Furthermore, the defendants allege in said paragraph of their answer that the share of the State of Kentucky in $144,667,660, the value of complainant's entire property, as ascertained in the manner last mentioned, at 35.68 per cent., according to the correct mileage basis, is $51,617,421, and deducting therefrom $23,013,825, the assessed value of the tangible property of complainant in

said State, the value of complainant's franchise in the State of Kentucky is $28,603,596, of which the value of such franchise as fixed by said board ($10,774,899) is only 37⅔ per cent.

To this answer the complainant filed a general replication (R., 29), and thereupon, as stated in the order of January 17, 1903 (R., 785), each party filed exceptions to the evidence (R., 783, 784-5), and the complainant read, upon its application for an injunction, the depositions of the persons named in said last mentioned order and the exhibits therewith, as well as numerous affidavits of the persons named in said order, including various affidavits which had been filed in other actions theretofore pending and determined in the Circuit Court of the United States for the District of Kentucky, which actions, styled *Louisville Trust Co. vs. Gus G. Coulter, et al., 107 Fed. Rep. 305*, will hereafter be referred to; and the defendants, in opposition to complainant's motion for the injunction prayed for, and on the trial of this action, read the depositions of the persons whose names are set forth in said order, as well as the affidavits of sundry other persons whose names are therein recited, including a large number of affidavits which had theretofore been filed in the actions above mentioned, all of which affidavits, read by each party by agreement of counsel, were to be considered as depositions, subject to the exceptions filed thereto, and the case was submitted on the demurrer to the bill as amended, in chief, and upon exceptions filed to the evidence, and for a final judgment, as stated in the order aforesaid. (R., 785-8.)

From the foregoing statement these questions arose for the decision of the Circuit Court:

1. Had the court jurisdiction of this action?

2. If so, did the bill as amended, state facts sufficient to entitle complainant to any relief in equity?

3. Did the facts proven justify the court in awarding the complainant the relief prayed for?

4. Did the county assessors habitually and intentionally or fraudulently assess the property of individuals and corporations not required to report to the Board of Valuation and Assessment at less than its fair cash value; and did the Board of Equalization intentionally or fraudulently equalize the assessments of such property subject to equalization on the basis of 80 per cent. of its cash value, for the year 1902?

5. Was the franchise, or intangible property of the complainant assessed by the Board of Valuation and Assessment at its full cash value, or at a sum in excess of 80 per cent. of such value, for the year 1902?

6. Had the complainant, by reason of the action of the county assessors and Board of Equalization, been discriminated against and denied the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States?

It must be apparent that, unless all of these questions, upon an examination of the pleadings and evidence, could be correctly answered by the court in the affirmative, complainant's bill should have been dismissed. In other words, if, within the rules and principles established by the decisions of the courts in cases of this class, either of said questions should have been answered in the negative, the complainant's prayer for an injunction against the defendants should have been denied.

The court below, however, after almost a year's consideration, handed down a lengthy opinion (R., 789-822), in pursuance of which the decree of November 9, 1903, was rendered. (R., 788-89.)

From this final decree the defendants filed their petition for an appeal to this court, which was allowed on November 18, 1903 (R., 823), and assigned the following grounds for error committed by the court below (R. 824-25):

1. In overruling the defendants' demurrer and each ground thereof to the complainant's bill as amended.

2. In overruling the exceptions of the defendants to the evidence of the complainant stated therein.

3. In adjudging that the property in the State of Kentucky, amounting to over $500,000,000 in value, assessed by the county assessors, and equalized by the State Board of Equalization, for the year 1902, was systematically or intentionally assessed or equalized at only 80 per cent. of or at less than its fair cash value.

4. In adjudging that the property of the complainant in the State of Kentucky was for said year assessed by the Board of Valuation and Assessment at its full cash value, or at more than 80 per cent. of its fair cash value, or in excess of the valuation placed on other property by the county assessors and Board of Equalization in said State for the same year.

5. In adjudging that the mileage of the railroads owned, operated, leased or controlled by the complainant at the time of the assessment by the Board of Valuation and Assessment for the year 1902, included any of the mileage of the Nashville, Chattanooga & St. Louis Railroad, or any of the mileage of the Georgia Railroad, or any of the mileage of any other railroad company in which complainant owned a portion of its capital stock.

6. In adjudging that the said board did not err in fixing only 26 per cent. as the percentage of value of all of the property of the complainant located in the State of Kentucky at the time fixed by law for assessment by the Board of Valuation and Assessment.

7. In not adjudging that the complainant's franchise or intangible property in the State of Kentucky as of September 15, 1901, for the year 1902, was assessed at 80 per cent. or less of its fair cash value by the defendants, constituting the board aforesaid.

8. In adjudging that the defendants, constituting the Board of Valuation and Assessment of the State of Kentucky, or either of them, be perpetually enjoined or restrained from in any way

enforcing, or attempting to enforce, the collection of taxes on the franchise assessment made by them of the complainant for the year 1902 on any amount or value exceeding the sum of $4,017,154.66, and in enjoining and restraining them as such board, or either of them, from enforcing, or attempting to enforce, the collection of taxes on any part of the amount assessed upon the franchise of the complainant for said year, and in adjudging that the defendant, S. W. Hager, treasurer of the State of Kentucky, be required to execute a receipt to complainant in full of its State taxes on its franchise assessment for said year, and in adjudging that defendants, Gus G. Coulter, auditor of public accounts, S. W. Hager, treasurer, and C. B. Hill, secretary of State, be enjoined or restrained from apportioning the franchise against the complainant for the year 1902 among the counties, cities, towns and districts, or any of them, in excess of the amount aforesaid, to wit: $4,017,154.66, and in enjoining and restraining the defendant, Gus G. Coulter, auditor aforesaid, from certifying to the counties, cities, towns and districts, or any of them, any apportionment of said franchise valuation for said year in excess of the sum last mentioned.

9. In adjudging that the complainant recover of the defendants, or either of them, its costs herein expended and awarding execution therefor.

10. In not adjudging that the complainant's prayer for an injunction be refused, its bill dismissed, and the defendants recover of the complainant their cost herein expended.

This appeal was perfected by the execution of an appeal bond by appellants on April 20, 1904 (R., 831), and the issuance of the citation, which was accepted by counsel for appellee April 25, 1904. (R., 1.)

ARGUMENT.

I.

THE CIRCUIT COURT HAD NO JURISDICTION OF THIS ACTION.

The appellants demurred to the bill of complainant as amended, and thus raised the question of the jurisdiction of the Circuit Court.

Appellee's action was brought under Section 5 of the act of March 3, 1891, based on the claim that the facts alleged involved the application of the Constitution of the United States, and that the revenue law of the State of Kentucky, as administered by appellants, in the assessment of appellee's franchise for taxation for the year 1902, is in contravention of the Fourteenth Amendment to the Constitution of the United States. The appellants, on their demurrer, insisted (1) that appellee's bill of complaint, as amended, fails to state facts sufficient to show jurisdiction in the

court below, on account of the alleged denial of the equal protection of the laws within the meaning of the Fourteenth Amendment; (2) that the bill as amended states facts showing appellee's suit is, in effect, against the State of Kentucky, so far as State taxes are concerned, in violation of the Eleventh Amendment to the Constitution of the United States; and (3) that by a failure to allege the amount in dispute, other than the taxes claimed by the State, the court below had no jurisdiction of the action so far as it concerned local taxes.

The sections of the revenue laws of the State of Kentucky of November 11, 1892, are copied into and made part of appellee's bill of complaint. (R., 6-10.) It will be observed by the court that these sections of said statute in substance provide for the imposition of a franchise tax or an assessment of the intangible property of certain corporations, including railroad companies, which is payable directly into the State treasury, and such assessed value is also made apportionable to certain counties, cities, towns and taxing districts, the value of such franchise being fixed by a board consisting of the auditor, treasurer and secretary of State. Section 4084 (R., 9) requires the State auditor, after thirty days from the final valuation of the franchise, to certify to the county clerks of the several counties in which a corporation exercises its franchise the portion of the assessment apportioned to them as therein provided, and Section 4091 (R., 9-10) requires the auditor to give final notice of the tax assessed for State purposes, which becomes due thirty days thereafter, but the auditor has no authority to coerce the payment of the tax.

It is insisted for appellants that where the valuation of a corporation's franchise has been made by said State board and the auditor has given final notice thereof, before suit is brought against him in his official capacity to restrain the collection of such tax, a bill can not be maintained by the corporation to enjoin the collection of that part of the tax due the State, for, as to it, the bill is in effect against the State, which is not subject to suit without its consent under the Eleventh Amendment to the Constitution of the United States. (*Louisiana vs. Jumel, 107 U. S. 711; Ex parte Ayers, 123 U. S. 443; Hans vs. State of Louisiana, 134 U. S. 1.*)

Appellee, in its bill, admits it is not permitted under the (local) law to sue the State. (R., 12.)

1. The original bill in this case (R., 10-12) shows that the State board, at the institution of this action, had made the final assessment of appellee's franchise for the year 1902, the amount thereof being fixed at $10,774,899.50, the State tax on which for said year amounted to $51,180.27, of which sum appellee, before filing its bill of complaint, had paid the sum of $19,081.48, leaving still due and owing a balance of $32,098.79, on July 1, 1902, from the appellee for State taxes for said year. While the appellee, in its

bill, states that said assessment was tentative or preliminary, the admissions of the bill show that it had, in fact, become final, and there was nothing left to be done by either of the appellants, in their official capacity, to make such assessment final, so far as the State was concerned. In other words, the bill admits that appellee had received thirty days' notice under Section 4083, Kentucky Statutes (R., 8-9), to appear and show cause against the preliminary assessment, and that appellee did appear before the State board and insisted that its property should not be assessed above the general level of values fixed for all property in the State, or in excess of 80 per cent. of its full value, but that appellants, acting as the Board of Valuation and Assessment, fixed the value of appellee's entire property in the State of Kentucky at $33,788,724.50, and had deducted $23,013,825, the value of its tangible property as assessed by the railroad commissioners, therefrom, and set down the difference, $10,774,899.50, as the value of appellee's franchise in the State of Kentucky. (R., 10-11.) Appellee claims in its bill that it is entitled to have this final assessed value, as fixed by said board, decreased 20 per cent., and admits that said board has declined to reduce said assessment as requested. (R., 11.) The original bill was filed July 2, 1902. An amended bill was filed November 18, 1902 (R., 18-19), which expressly admits that the assessment of appellee's franchise had been made at that date for said year, but alleges that the apportionment thereof had not yet been certified by the auditor to the various counties, cities, towns, and taxing districts, and no coercive steps had been taken by the State to collect its taxes upon the total assessment. The bill further alleges: "These steps will be taken, and *the assessment as made* will be certified down as aforesaid, unless the said defendants are restrained." (R., 19.)

It must be remembered that the demurrer of appellants, on the grounds above mentioned, was to the bill as amended. (R., 785.) On the face of the bill as amended, therefore, it is clear that appellee's suit was against the State of Kentucky, so far as State taxes were concerned, and could not be maintained without its consent.

In a similar case, under the provisions of the same statute of the State of Kentucky, the Circuit Court of Appeals of the Sixth Circuit, in the case of *Coulter, Auditor, vs. Weir*, decided February 13, 1904 (*127 Fed. Rep. 897*), held that such a suit after final assessment was a suit against the State, and could not, therefore, be maintained against the will of the State. In the course of the opinion by Circuit Judge Lurton, in that case, he said (906-7):

"In respect to the tax due the State, the auditor has no other act to do under the statute, and has no authority to enforce the collection of that tax. The tax so due is payable 'into the treasury' by the express terms of Section 4086. The bill does

charge that the defendant 'is threatening to proceed to enforce and collect said tax and penalties,' and the prayer of the bill is that the defendant be commanded 'to refrain from collecting or attempting to collect any of said tax alleged to be due the State of Kentucky.' As we have elsewhere stated, the defendant denies that he had any power to distrain for the tax so due the State, and avers that the law of Kentucky contains no provision for the enforcement of the franchise tax so assessed in behalf of the State except by a suit brought in a court having jurisdiction, in the name of the State and by the State's attorney general. Counsel representing the appellee have not pointed out any provision of law under which the defendant, as auditor, had any power or authority to coerce the payment of the tax so assessed, and we have searched in vain for any remedy against a recalcitrant taxpayer of such a franchise tax, so far as same is due the State, other than those found in Sections 4091 and 113, Ky. St., 1903. By Section 113 it is made the duty of the attorney general 'to institute proper procedure to coerce payment of all demands of the Commonwealth, payable at the treasury, not discharged in proper time.' And by Section 4091 it is provided that any tax assessed upon the franchise of any of the companies mentioned in the article, not paid, after 30 days' notice, shall be deemed delinquent, and that a penalty of 10 per cent. shall attach; and that the delinquent 'failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.' This remedy by suit appears to have been in fact resorted to in respect to some of the tax here involved, for the defendant testifies that actions have been brought to enforce same in the Franklin Circuit Court.

"To enjoin the defendant from collecting or attempting to enforce the payment of this tax would be manifestly fruitless, unless the decree is to affect and conclude the State. The decree appealed from did not stop with an order commanding the defendant to take no other or further step under the law, because he had, under the law, no other or further duty in connection with the matter, but adjudicated the amount due under a legal assessment and undertook to annul the assessment in excess of that sum. The court, in this, *exceeded its jurisdiction*, for jurisdiction over the defendant did not give it jurisdiction over the State of Kentucky, as the decree seems to assume. If the defendant had been about to take some step under color of the law tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with the complainants on the merits, about to commit a trespass for which he would be individually liable, and in a proper case

equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the State, *and the bill, so far as it sought relief against the State tax, must be dismissed without regard to the merits.*"

The demurrer of the appellants to the bill, as amended, on the ground that it showed the court below had no jurisdiction of this action, should have been sustained, so far as any relief was sought by appellee against the balance of State taxes ($32,098.79) due on said final assessment of its franchise for the year 1902, and the action to that extent should have been dismissed without regard to the merits.

2. The original bill alleges that the amount involved or in controversy in this action, without considering the local taxes, exceeds, exclusive of interest and costs, the sum of $2,000, but there is no allegation in the original or amended bill stating the amount or value of the local taxes due the counties, cities, towns, and taxing districts on said assessment, and it can not be discovered from the allegations of the bill as amended whether or not such local taxes involved herein, exclusive of interest and costs, exceed the sum of $2,000.

In the case of *Coulter, Auditor, vs. Fargo*, decided by the Circuit Court of Appeals of the Sixth Circuit, February 13, 1904 (*127 Fed. Rep. 912*), the court, in an opinion by Judge Lurton, held that where, in a suit to restrain the enforcement of a franchise tax against a corporation, amounting to about $3,000, under the same statute, it was averred that $1,117.04 of such amount was claimed by the State of Kentucky, and the balance by the counties, cities, towns, and taxing districts for local purposes, and the bill was not sustainable in so far as it affected the amount claimed by the State, on the ground that the suit was really against the State, which could not be sued without its consent, the amount of the tax in controversy which remained was insufficient to confer jurisdiction on the Federal courts. On this point the court said (*Ib.* 913):

"It thus appears that the jurisdictional amount essential to give the Circuit Court jurisdiction is only attained by aggregating the taxes claimed by the State with the taxes for local purposes in case the defendant is permitted to certify the assessment to the county clerks for purposes of local assessment. It has been objected that the taxes claimed by the State can not be added to those claimed by local municipalities for the purpose of obtaining the necessary jurisdictional amount, and the cases of Walter vs. Northeastern Railroad Co., 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206, and Fishback vs. W. U. Tel. Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630, have been cited. The real jurisdictional difficulty lies in the fact that the bill will not lie in respect of the tax claimed by the State. The valuation and assessment for State

purposes was complete when the bill was filed. The tax due the State was then due and payable into the treasury of the State. The defendant, as auditor, was charged with no further duty in respect to the State tax, and had no power to coerce its payment. As we had occasion to decide in Coulter vs. Weir, the law of Kentucky provides no summary process for the collection of this tax so far as it is due to the State, and the only remedy for its collection is by a suit in the name of the State, brought by the State's attorney general. To enjoin the defendant from collecting the tax so assessed would be idle, inasmuch as he has no control over the suit necessary for its enforcement, even if it were competent to enjoin the State or its officers from bringing a suit for such a purpose. Fitts vs. McGhee, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535; Arbuckle vs. Blackburn, 113 Fed. 616, 51 C. C. A. 122. The suit, therefore, though nominally against the defendant Coulter, is in effect a suit against the State so far as it sought to annul or enjoin the enforcement of the tax assessed for State purposes. Inasmuch as the suit can not be maintained in respect to the tax due the State, the requisite amount to give a Federal court jurisdiction can not be made by aggregating the tax claimed by the State and that claimed by other taxing municipalities. In other words, the court did not have jurisdiction, because the matter in dispute did not exceed in value the sum of $2,000, unless it had jurisdiction over the tax due to the State as well as that due to the counties, cities and towns. It follows that this bill should have been dismissed so far as relief was sought in respect of the tax due the State of Kentucky, because it was really a suit against the State, which was an objection made by demurrer and raised by the answer. Fishback vs. W. U. Tel. Co., 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630. This left the suit unmaintainable for the other purposes of the bill, because the necessary jurisdictional amount was not involved."

So the same condition exists here, and the suit could not be maintained, either as to State or local taxes.

3. The complainant is a domestic corporation of the State of Kentucky. There is no diverse citizenship. The bill shows both parties reside in that State. The original jurisdiction in a suit between parties who were citizens and residents of the same State, where the subject-matter of the action was similar to that involved in the case at bar, was upheld by the Circuit Court of the United States for the Middle District of Tennessee in an elaborate opinion by District Judge Clark. (*Nashville, Chattanooga & St. Louis Railway vs. Taylor, 86 Fed. Rep. 168.*) In that case, however, Judge Clark used this significant language (*Ib.* 186):

"It may be true that the proposition that a tax statute, or the tax laid under a statute, is in violation of the Constitution of the State, is not of itself necessarily sufficient to constitute a violation of the Fourteenth Amendment; but when, in addition to the violation of

the State Constitution, the statute results in an arbitrary and oppressive discrimination, in regard to a *large class* of citizens, or a *large species* of property, it is such *class* legislation and such denial of the equal protection of the laws as renders it obnoxious to the Fourteenth Amendment."

What the final opinion on the merits in that case was does not appear.

In *Railroad and Telephone Companies vs. Board of Equalization of Tennessee, 85 Fed. Rep. 302*, Judge Clark, with respect to what constituted a denial of the equal protection of the laws within the jurisdiction of a Circuit Court of the United States, said (*Ib.* 306-307):

"A constitutional and legal inequality in taxation does not refer to *individual* hardship, like the difference in the assessments placed on the property of two individuals, nor does it relate to those differences in value which grow out of mere differences in opinion, nor does it relate to those inequalities which arise by reason of an essential difference in the kind and use of property, with a proportionate difficulty in getting at the real value. Inequality, in the legal and constitutional sense, refers to substantial differences relating to *large classes* of property, and to differences in the system or methods by which such properties are assessed for taxation."

That decision throughout proceeds upon the ground that the tax laws of the State of Tennessee, as actually executed, resulted in a discrimination against a *large species* of property and a *large class* of taxpayers, and the cases in which it was rendered are to be so understood in all their aspects.

In *Taylor vs. Louisville & Nashville R. R. Co., 88 Fed. Rep. 350*, the jurisdiction was sustained on the ground of diverse citizenship. After stating the facts, Circuit Judge Taft, on that point, said (*Ib.* 356):

"The complainant below is a citizen of the State of Kentucky. The defendants are citizens of the State of Tennessee. The amount involved in the suit exceeds $2,000. The Constitution and the laws of the United States confer upon Circuit Courts of the United States jurisdiction to hear and determine controversies in law and equity between citizens of *different* States in which is involved more than $2,000. There is no doubt, therefore, of the jurisdiction of the court below to hear and decide this case."

Again, he states (*Ib.* 357):

"We have seen that the Circuit Court has jurisdiction over the cause, *because* it is a suit between citizens of *different* States."

It would appear from these expressions in the opinion in that case that jurisdiction was upheld on account of the diverse citizenship of the parties, and had the complainant and defendant been citizens of Tennessee, the jurisdiction would not have been sustained.

In *Louisville Trust Co. vs. Stone, Auditor, 107 Fed. Rep. 305*, where an appeal was taken from the order of the Circuit Court refusing to grant a temporary injunction, and where all the parties were citizens of the State of Kentucky, the jurisdiction of the court does not appear to have been challenged by demurrer to the bill. However, the court states:

"It may be conceded that, if the allegations of the bill are made out, there exists, in respect to the property of complainant and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the State, which necessarily effects an injurious discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment. Taylor vs. Railroad Company, 31 C. C. A. 537, 88 Fed. Rep. 350; Railroad Company vs. Taylor (C. C.), 86 Fed. Rep. 168, in which the grounds of Federal jurisdiction are carefully examined and fully stated by Judge Clark, who delivered the opinion."

On the facts in that case the court affirmed the ruling of Judge Clark in the court below refusing the injunction asked, upon the ground of systematic, intentional, and illegal undervaluation of other property by the taxing officers of the State of Kentucky, whereby it was alleged that an unjust discrimination had been made against the property of which the complainant in said action was the owner.

The jurisdiction in the case of *Cummings vs. Merchants National Bank, 101 U. S. 153*, wherein the subject-matter of the action was similar to that of the case at bar, and in other national bank cases of like character which followed it, was sustained by reason of the provisions of the National Banking Act.

The rule established in these national bank cases against discriminating taxation, in violation of the National Banking Act, has not yet been applied by this court, so far as we are informed, to a similar discrimination in the taxation of other property as being a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution—that is, a case has not yet been presented in this court where the facts sustain the allegation that there was an intentional and habitual discrimination in values under the rule declared in the national bank cases referred to.

It was held, however, in *Albuquerque National Bank vs. Perea, 147 U. S. 87*, that a complainant could not complain of the undervaluation of other property when its own property was also assessed below the required "cash value," without *allegation* and *proof of design* on the part of the officials.

Under the authorities cited it is insisted that the complainant in the case at bar did not allege facts which showed jurisdiction in

the court of this action, and the demurrer on that ground should have been sustained.

II.

THE PROOF SHOWS THE ASSESSMENT OF APPELLEE'S FRANCHISE HAD BECOME FINAL BEFORE THIS ACTION WAS INSTITUTED.

If the allegations of the bill as amended do not clearly disclose the fact that the assessment of appellee's franchise had not become final prior to the institution of this action, the uncontradicted testimony of Auditor Coulter, places that matter beyond controversy. The court is referred to Exhibit No. 6, being a copy of the preliminary notice, with the deposition of the appellant, Coulter, as auditor aforesaid, taken by appellee (R., 491), which shows the notice to appellee of said board's tentative assessment was given May 14, 1902. That assessment shows the value of the appellee's franchise was first fixed at $12,912,626, and the State tax thereon amounted to $61,334.97. The court is also referred to Exhibit No. 4, being a copy of the final notice, with the same deposition (R., 488-89), which shows that upon a full hearing and the expiration of thirty days' time allowed by statute, after notice of the preliminary assessment, the appellee was given notice on July 1, 1902, the day before this action of appellee was instituted, of the fact that the board had finally assessed the value of the appellee's franchise at $10,774,899.58, and the State tax thereon amounted to $51,180.77. Thus the court will observe that appellee succeeded, on the hearing awarded to it, in having said board reduce the preliminary assessment of its franchise for said year by $2,137,726.42, and its State tax by the sum of $10,154.20; but not being satisfied with such reduction obtained before said board, appellee on July 2, 1902, brought this action to enjoin the State from collecting its taxes to the extent of $32,098.79, being the balance after such reduction and the payment aforesaid of $19,081.48.

III.

THE BILL AS AMENDED DOES NOT STATE FACTS SUFFICIENT TO ENTITLE COMPLAINANT TO ANY RELIEF IN EQUITY.

1. It is insisted for appellants that the bill of complaint as amended does not allege facts sufficient to entitle the complainant to any relief in a court of equity. It is not alleged in the original bill that the members of the State Board of Equalization habitually, systematically, and intentionally equalized property subject to equalization by said board at 80 per cent. of its fair cash value, nor is it alleged in complainant's amended bill that the county

assessors habitually, systematically, and intentionally assessed the property of individuals and corporations not required by law to report to the Board of Valuation and Assessment below its fair cash value, but in the amended bill appellee simply alleges that the county assessors "uniformly" assessed below its value the property of individuals and corporations not required to report to the Board of Valuation and Assessment. (R., 18.) It is submitted that the allegations of the bill as amended are not sufficient to bring this case within the rule announced in this class of cases by the Federal courts.

In the pioneer case of *Cummings vs. Merchants National Bank, supra*, it appeared by the uncontradicted evidence introduced—indeed it was admitted—that the assessors in convention assembled from eleven counties in northern Ohio deliberately adopted a rule by which real and personal estate, except money, was assessed at one-third, and money and invested capital at six-tenths of its actual value, while bank stock, as returned by the State Board of Equalization, was assessed fully equal to its selling value in money. In the course of the opinion in that case Mr. Justice Miller said:

"We are of the opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment which is *designed* to operate unequally, and to violate a fundamental principle of the Constitution, and when this rule is applied *not solely to one individual*, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case *made by this bill*, and if supported by the testimony, relief ought to be given."

The necessary facts in that case were alleged concerning the discrimination complained of, and the proof to sustain the allegations of the bill was overwhelming, and without contradiction in any essential particular.

In the case mainly relied on by counsel for complainant in the case at bar, *Taylor vs. Louisville & Nashville Railroad Company, 88 Fed. Rep. 350*, Judge Taft, in the course of his opinion, announced the correct doctrine in cases of this kind in the Federal courts, as follows:

"Equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, *due to mistake, to the fallibility of human judgment*, or to other accidental causes, must be borne, for the reason that absolute uniformity can not be obtained; that, in other words, what may be called 'sporadic cases of discrimination' can not be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, *systematic, intentional and unlawful undervaluation* for taxation by the taxing officers, which necessarily effects an unjust discrimination against the species of property of which the com-

plainant is an owner. The reason for the distinction is obvious. Occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an *illegal purpose* on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it can not be justified, *except on the ground of an obvious violation of law or something equivalent to fraud.* It does not lie where the injury complained of arises only from the *erroneous, but honest, judgment* of the lawfully constituted tax tribunal. The interference by the chancellor in the case at bar, and in the Cummings case, rests on *something equivalent to fraud* in the tribunal imposing the tax. The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system *intentionally, and therefore fraudulently*, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property."

In *German National Bank vs. Kimball, 103 U. S. 732*, the bill of complaint was dismissed on demurrer, and from that decree the appeal was taken. With respect to the bill Mr. Justice Miller, in his opinion, stated:

"The bill is made up of averments which are intended to show that the valuation of the property of other persons in the same town, made by the same assessor, is less in proportion to its actual cash value than that of plaintiff's shares; that the same is true in other parts of the State; that some corporations are favored in this valuation, and that certain classes of property are favored in a general way. But there is no distinct averment that the shares of this bank are valued higher for the purpose of taxation than other moneyed capital generally, though this is alleged in regard to particular instances. The allegations are pretty full that the assessments are partial, unequal and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires."

After citing the cases of *Pelton vs. Commercial National Bank, 101 U. S. 143*, and *Cummings vs. Merchants' National Bank, Ib. 153*, Mr. Justice Miller further states in the Kimball case:

"It is held in these cases that when the inequality of valuation is the result of a statute of the State *designed* to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to

make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. *But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor*, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject. * * *"

In *Albuquerque National Bank vs. Perea, supra*, Mr. Justice Brewer, in delivering the opinion of the court sustaining the decree of the lower court dismissing the original and supplemental bills, said:

"As to the tax of 1888, the case stands upon the allegation that plaintiff's property was originally assessed at its full value, while other property was assessed at 70 per cent. thereof; that it appealed to the Board of Equalization for a reduction; and that such tribunal reduced the valuation, but only to 85, instead of 70 per cent. It would seem that the mere statement of this was sufficient. The law of New Mexico requires property to be assessed at its cash value. Confessedly, this plaintiff's property was assessed at 15 per cent. below that value. Surely, upon the mere fact that other property happened to be assessed at 30 per cent. below the value, when this did not come from any *design or systematic effort on the part of the county officials*, and when the plaintiff has had a hearing as to the correct valuation, on appeal before the Board of Equalization, the proper tribunal for review, it can not be that it can come into a court of equity for an injunction, or have that decision of the Board of Equalization reviewed in this collateral way. (Stanley vs. Albany County Supers., 121 U. S. 535.)"

In the case of *New York ex rel. vs. Barker, 179 U. S. 190*, this court affirmed the decision of the Court of Appeals of New York sustaining a tax against a corporation. In the course of the opinion delivered, Mr. Justice Peckham said:

"Under these statutes the tax upon real estate must be imposed in all cases, both of individuals and of corporations, upon its full and true value as found by the assessors. In the case of the individual, however, no resort can be had to any other proceeding by which that tax can be increased by any subsequent assessment upon the difference between the assessed and the actual value of the real estate, if any there should be. In the case of corporations, on the contrary, under the construction given the statute of 1857 by the Court of Appeals, in the last above-cited case, if the real estate should be mistakenly assessed under the general statute at an undervaluation for purposes of separate taxation, the difference between the assessed and the actual value of the real estate may be reached in making an assessment upon the actual value of the capital under the act above mentioned. By such a result, it is

claimed, the company is denied the equal protection of the laws. It must be remembered there is no claim made that in any event the corporation is taxed upon any property not legally taxable, or that it is taxed beyond the actual value of its property as provided by law. The only claim is that in this opportunity to correct a mistaken assessment upon its real estate in the case of a corporation when assessed upon its capital, which does not exist in the case of an individual, the corporation is denied the equal protection of the laws. This is the sole Federal question in the case.

"It is seen that the laws of the State provide for no undervaluation of real estate owned by either individuals or corporations. Those laws provide in terms for the assessment of all real estate at its actual value, while the whole force of the contention of the plaintiff in error is based upon the fact of undervaluation, although it is in the very teeth of the statute, and is a plain violation of its provisions. If there were no undervaluation of real estate, or, in other words, if the laws of the State were complied with, the question sought to be raised by the plaintiff could not arise. The failure of the assessors in this one instance to assess the real estate of the company for separate taxation at its actual value, and its assessment at that value in assessing for taxation the actual value of the capital stock of the company, could obviously work no denial of the equal protection of the laws of the company, if individuals were in fact assessed for their ownership of real estate at its full and true value, as required by law. If the law were faithfully carried out, no harm could in any event come to the plaintiff in error by this subsequent assessment of its real estate at its full value, for it would only pay the same as individuals, they being assessed upon their real estate at its full value. To raise the question which the plaintiff in error seeks, it was, therefore, obviously necessary to *allege* and *prove* as a fact that there was *habitual violation* of law by undervaluation; that, in the language of Mr. Justice Miller, in *Albany County Supers.* vs. *Stanley*, 105 U. S. 305, 318, 26 L. Ed. 1044, 1121, the assessors '*habitually and intentionally, or by some rule prescribed by themselves or by some one whom they were bound to obey*,' undervalued real estate for assessment in New York City; or, as stated in *Cummings* vs. *Merchants' Nat. Bank*, 101 U. S. 153, 25 L. Ed. 903, 904, that a *rule* or *system* of valuation had been adopted by those whose duty it was to make the assessment, which was *designed to operate unequally and to violate a fundamental principle of the Constitution*, and that such rule had been applied, *not solely to one individual*, but to a *large class* of individuals or corporations. It was said in that case that this was precisely the case made by the bill, and, if supported by the testimony, the court thought relief should be given. There was both *allegation* and *proof*.

"Both these cases related to the taxation of national bank shares, and the question was whether the tax levied violated the provisions of the National Banking Act on that subject.

"In this record there is *no averment* and *no proof* of any violation of law by the assessors of New York. * * * But we are nevertheless asked by the argument at bar, in the absence of *allegations* or *proof* of *habitual*, or indeed of any, undervaluation, to assume to take judicial notice of its existence, notwithstanding such undervaluation would constitute a clear violation of the law of the State. And this we are asked to do in order to reverse a judgment of a State court. Such a presumption of the violation of law and their duty by the assessors the Court of Appeals of New York expressly refused to adopt. (*People ex rel. Manhattan R. Co.* vs. *Barker*, 146 N. Y. 304, 40 N. E. 996.)"

In the case of *State ex rel. vs. Western Union Telegraph Co.*, 165 Mo. 504, it was expressly alleged in the answer of the telegraph company that the State Board of Equalization *intentionally* discriminated against it in assessing its property at its full value, while other property was only assessed at from 35 to 40 per cent. of its value, and had thus been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution. The court, however, after reviewing the Federal court decisions relied on by said telegraph company, held that said allegation had not been made good by the proof, using this language (*Ib.* pp. 516-17):

"The defendant has not brought itself within the rule announced in those cases, for it has shown no *combination among assessors* and no course of conduct among them to *discriminate* against the defendant or other telegraph companies and other property owned by citizens generally. It has only shown by the testimony of one member of the State Board of Equalization that in his judgment the valuation put upon property generally is only 35 or 40 per cent. of its true value. The law contemplates that for purposes of taxation property shall be assessed at its true value in money (R. S., 1899, Sec. 9180), and it also presumes that all officers do their duty. (Agan vs. Shannon, 103 Mo. 661; State ex rel. vs. Bank, 120 Mo. 161; Mathias vs. O'Neill, 94 Mo. 520.) The evidence adduced is not sufficient to overthrow this presumption, nor to establish a combination or unlawful course of conduct. It is only enough to show what the witness *believed* to be the value of the property, but not enough to convict the local assessors of *intentional* or *systematic* violation of duty."

The judgment in that case was affirmed by this court. (*Western Union Telegraph Co. vs. Missouri, 187 U. S. 412-17.*)

One of the clearest decisions in this class of cases is that of Judge Sage in *Exchange National Bank vs. Miller, 19 Fed. Rep. 372*, where a National bank contested the validity of a tax on the ground that it had been discriminated against in the assessment of its property, compared with the assessments of other property. After reviewing the testimony, the opinion on this branch of the case is as follows (*Ib.* 374-376):

"It is contended for the complainant that this testimony brings the case within the rule of Pelton vs. Nat. Bank, 101 U. S. 153, and Cummings vs. Nat. Bank, 101 U. S. 153. That is not our view. In Pelton vs. Nat. Bank, it was held that the *systematic* and *intentional* valuation of all other moneyed capital by the taxing officers far below its full value, while shares of national banks were assessed at their full value, was a violation of the act of Congress which prescribes the rule by which they were to be taxed by the State. In that case the court found that the valuation of national bank shares was *intentionally* higher than the valuation of other personal property, and that this discrimination was neither an accident nor a mistake, but a principle *deliberately adopted* in the valuation of all shares in national banks, and applied without exception, and, therefore, the decree below in favor of the complainant was affirmed. In Cummings vs. Nat. Bank, the Supreme Court found that the assessors of real property, the assessors of personal property, and the auditor of Lucas County, Ohio, *concurred in establishing a rule* of valuation by which real and personal property, except money, was assessed at one-third, and money or invested capital at six-tenths, of its actual value, and that the assessments on shares of incorporated banks, as returned by the State Board of Equalization for taxation to the auditor of Lucas County, were fully equal to their selling price and to their true value in money, and the decree enjoining the collection of the excessive tax was affirmed.

"No such state of facts is shown in the case now before this court. It is true, as shown by the testimony, that, although the shares of the complainant were valued for taxation at but 86.7+ per cent. of their true value in money, they were valued higher than other personal property, but the error or inequality is not shown to arise otherwise than from a *mistake in judgment* on the part of the assessing officials. It would, perhaps, be more exact to say that the *judgment of the assessors*, in their *official* valuation, *differs* from the *judgment of witnesses* in their *unofficial* valuation, as expressed in their testimony. The differences are no greater than frequently arise between witnesses in cases on trial on questions of value. And there is no certain standard by which the court can determine which is correct. Valuations, excepting of money and of standard marketable articles, are, at best, uncertain. The influences which affect salable values are various and often complicated. Much depends upon who is the owner or the vendor, as well as upon who is the purchaser. The shrinkage in the value of estates results in many instances largely from the consideration that the salable value imparted by the fact of the ownership of the deceased is gone. A thousand influences, tangible and intangible, so affect the salable value of property, real and personal, in the city and in the country, as to make its true valuation a work of exceeding difficulty, and it is not to be wondered at, nor is it a circumstance of

itself warranting an appeal to a court of chancery, that there are great inequalities in valuations for taxation. To correct these the State has provided for appeals to appropriate tribunals, whose duty it is to equalize valuations and the burden of taxation. When these are exhausted all that can be done, practically, is done, *excepting in cases of intentional discrimination.*

"We are of the opinion that the rule laid down in Nat. Bank vs. Kimball, 103 U. S. 732, applies here. There it was held that no case for relief is made by *averring* that the assessments are unequal and partial, and that some other property is rated for taxable purposes at less than one-half of its cash value, unless it is *further averred* that the officers appointed to make assessments *combine together and establish a rule or principle of valuation*, the necessary result of which is to tax one species of property higher than others, and higher than the average rate. It has been held, and, we think, correctly, that inequalities in valuation may be so great as to authorize the court to conclude that they are the result of *intention*, but we do not think that the testimony warrants such conclusion in this case.

"To the same effect as National Bank vs. Kimball is Wagoner vs. Loomis, 37 Ohio St. 571, where it was decided that inequalities in valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of *fraudulent discriminations* by the agents and officers making such valuations, and that a petition for such injunction, which shows that the plaintiff's property was valued at only 80 per cent. of its true value in money, while other property in the county was valued at only 40 per cent. of its value, and *avers* that such valuations were unequal, unjust and illegal, is *insufficient.*"

In the opinion of the court below the appellants' demurrer to the bill on this ground is disposed of as follows (R., 821):

"It is claimed that the bill does not allege facts sufficient to bring the discrimination complained of within the rule as to what is essential to constitute illegal discrimination in such cases, or, in other words, that it is not alleged that the undervaluation of the property subject to equalization was systematically, habitually and intentionally made. It is true that these words were not used, and the bill might have been fuller in this particular. It does, however, use language that is equivalent thereto. It alleges that the assessors of the various counties in the State *uniformly* assessed said property below its value, in many instances below 50 per cent., in over 90 per cent. below 80 per cent., and in very few counties above its value, and that the equalizers undertook to equalize all assessments coming before them on the basis of 80 per cent., but in reality did not equalize them at above 80 per cent. of their value. According to these allegations, the assessments of said property after equalization could not have been but *systematically, habitually and intentionally undervalued.*"

We submit that this construction of the complainant's bill as amended is unsound, and too liberal in a case of this kind, where the allegations in the bill must be clearly, directly, and specifically made. The word "uniformly" is not the equivalent of either of the words "systematically," "habitually," or "intentionally."

2. In addition to the failure to allege the assessments complained of were made by the assessing officers habitually and intentionally, and, therefore, fraudulently, the bill is without equity, because no payment is alleged to have been made to the counties, cities, towns, and taxing districts into which complainant's lines extend, of the taxes due them, respectively, for the year 1902, nor has the amount of such tax been tendered or paid into court for their use and benefit, *upon so much of the assessment of complainant's franchise as* is conceded to be correct, to wit, $4,017,154.66. The amount of these local taxes could have been ascertained by complainant prior to the final hearing of this action. The levies are bound to be matters of record. The mileage of complainant's lines in all these subdivisions is easily ascertained from its own records and reports, as well as from the official reports of the Railroad Commission. For more than two years complainant, by this action, has kept these counties, cities, towns, and taxing districts from receiving any sum whatever on the assessment of its franchise for 1902, when the bill concedes their right to taxes on their pro rata shares of the amount above stated. The auditor, under the statute, is bound to certify to the several County Court clerks the apportionment made by said board of the entire assessment to each county, city, town, and taxing district. He can not piecemeal these apportionments. It is a matter involving great labor and intricate calculations, which would be doubled if the board were to attempt to first make an apportionment, and the auditor to certify to the county clerks, on the basis of the sum conceded to be correct, and again upon the entire assessment, or as may be determined by the court. It was just as much the duty of complainant to pay, or tender and offer to pay, the taxes conceded to be due the counties, cities, towns, and taxing districts, as it was to pay the taxes conceded to be due the State, as it did. If there was not sufficient time to do this before filing the bill, there was ample time afterward, and before the filing of the amended bill, and the hearing of the application for a preliminary injunction, and submission of the action for final judgment.

On this point what Mr. Justice Miller said, in the *Illinois Railroad Tax Cases, 92 U. S. 575*, is conclusive. Toward the close of his opinion in those celebrated cases, he said:

"But there is another principle of equitable jurisprudence which forbids, in these cases, the interference of a court of chancery in favor of complainants. It is that universal rule which requires that he who seeks equity at the hands of the court must first do equity.

"The defendants in all these cases are the clerks and treasurers of the counties; the clerk who makes out the tax list, and the treasurer who collects the taxes. These taxes are both the State and county taxes. It is clear, from the statements of the bills and from what we have already said, that there must be in every county mentioned a considerable amount of real estate and personal property coming within the character of local tangible property and subjected to taxation on precisely the same principles, and no other, that all other personal and real estate within the county is taxed. It is equally clear that the roadbed within each county is liable to be taxed at the same rate that other property is taxed. Why have not complainants paid this tax? In reference to the latter, it is said that they resist the rule by which the value of their roadbed in each county is ascertained, and therefore resist the tax. But surely it should pay tax by some rule. If the rule adopted gives too large valuation in some counties, it must be too small in others. What right have they to resist the tax in the latter case? And in the former, is the whole tax void because the assessment is too large? Should they pay nothing, and escape wholly because they have been assessed too high? These questions answer themselves. Before the complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them.

"It is a *profitable thing* for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. *They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted.* The State is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.

"We are satisfied that an observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. *We lay it down, with unanimity, as a rule to govern the courts of the United States in their action in such cases.* Cooley on Tax., 537; Palmer vs. Napoleon, 16 Mich. 176; Hersey vs. Milwaukee Co., 16 Wis. 185; Roseberry vs. Huff, 27 Ind. 12; Frazer vs. Seibern, 16 Ohio St. 614; Parmley vs. R. R. Co., 3 Dill, 19."

In the Ohio cases (*Pelton vs. Commercial National Bank, 101 U. S. 143*, and *Cummings vs. Merchants' National Bank, Ib. 153*,) the complainants paid into court the amounts admitted to be due.

In *German National Bank vs. Kimball, 103 U. S. 732, 735*, the failure to pay or offer to pay any taxes whatever was commented on by the court as follows:

"And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertained precisely to the last dollar what each share should have paid. We think the Circuit Court did not err in dismissing *such* a bill, and its decree is affirmed."

In *Albuquerque National Bank vs. Perea, 147 U. S. 87, 90*, the same objection to the bill was held to be fatal, as follows:

"With respect to the taxes of 1889, there was no payment or tender of payment of any amount. Plaintiff seeks to avoid the necessity therefor by alleging that it is impossible to separate the legal from the illegal portions of the taxes; an allegation which is manifestly untrue, in view of the fact that it had no difficulty in making the separation in the taxes of 1888, the assessment for which was made in a similar way; and in view of the further fact that it must have known what property it had which was subject to taxation, as well as its value, and therefore, the rate of taxation being fixed by law, it could, of course, have known what amount was undoubtedly due. The rule in respect to this matter is perfectly well settled in this court. In State Railroad Tax Cases, 92 U. S. 575, 616, it was fully considered."

In *Northern Pacific R. Co. vs. Clark, 153 U. S. 252*, it was held that no one can have an injunction against the collection of a tax until he has paid so much of the tax assessed against him as it can be plainly seen he ought to pay; and that the bill of said railroad company to enjoin the collection of the taxes imposed upon its property in certain counties in North Dakota was without equity, because of the *failure to aver* that the company had tendered or paid the gross earnings tax for the year 1889 (or the tax assessed by the county auditors), and that complainant was not entitled to the equitable relief prayed for without first tendering or paying such taxes. The court in that case said:

"Applying this rule to the present case, it is clear that the appellant's bill was properly dismissed for failing to pay, or tender to pay, taxes which it ought to have paid on its property, or, in lieu thereof, a percentage of its gross earnings."

The court below, in the opinion delivered (R., 821), held that the appellee was not bound to tender any sum into court, because the apportionment of the assessment had not been made. This is incorrect. Auditor Coulter testifies the board had made the apportionment before this suit was brought, and he had directed

the clerk of the board to enter up the same among the various counties, municipalities, and taxing districts of the State, according to mileage in each of them. (R., 76.) This mileage was within the knowledge of the appellee, and its report to the auditor set it all out. All it had to do to ascertain the share of each county, municipality, and taxing district, was to divide the whole amount of assessment conceded to be correct by the mileage in each, and then from the record of the levy made by each county, municipality, and taxing district, calculate the amount of taxes due them, so as to tender or pay the same into court. The decree appealed from required appellee to execute a bond within thirty days to secure the counties, municipalities, and taxing districts (R., 789), but it has not done so.

Under the authorities cited, and for the reasons stated, it is submitted that appellants' demurrer for want of equity in the bill ought to have been sustained.

IV.

THE COUNTY ASSESSORS DID NOT HABITUALLY AND INTENTIONALLY NOR FRAUDULENTLY ASSESS THE PROPERTY OF INDIVIDUALS AND CORPORATIONS, NOT REQUIRED TO REPORT TO THE BOARD OF VALUATION AND ASSESSMENT, AT LESS THAN ITS FAIR CASH VALUE; NOR DID THE BOARD OF EQUALIZATION INTENTIONALLY OR FRAUDULENTLY EQUALIZE THE ASSESSMENTS OF SUCH PROPERTY SUBJECT TO EQUALIZATION ON THE BASIS OF 80 PER CENT. OF ITS CASH VALUE FOR THE YEAR 1902.

1. This question is susceptible of division into two branches, and we shall first discuss the evidence bearing upon the assessments made by the county assessors of property assessable by them for the year 1902, with a view to enable the court to determine whether or not such assessors habitually, intentionally, systematically, or fraudulently undervalued the different classes of property assessable by them for the purpose of discriminating against the owners of franchises or intangible property assessable by the Board of Valuation and Assessment. If the court shall conclude that the allegations of the bill are sufficient to give jurisdiction to the Circuit Court, and to constitute a cause of action, then we contend that the proof introduced by the complainant falls far short of what is required by the decisions of the Federal courts in this class of cases before an injunction will be granted, interfering with the collection of the public revenues of a sovereign State. In the first place, the burden of proof is upon the complainant to make out its case by clear, satisfactory, and convincing evidence. As was said by Judge Key in *Trustees Cincinnati Southern Railway vs. Guenther, 19 Fed. Rep. 398*:

"In such cases, all doubts are resolved in favor of the tax. The defense must make its right to resist the collection of the tax clear and manifest before it can have relief."

In *Taylor vs. Louisville & Nashville R. Co., 88 Fed. Rep. 373, 374*, Judge Taft said:

"He (the chancellor) can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluation for taxation by the taxing officers, which necessarily effects an unjust discrimination against the species of property of which the complainant is an owner. * * * More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it can not be justified except on the ground of an obvious violation of law or something equivalent to fraud."

This decision of Judge Taft, it must be remembered, was not based on, nor does it discuss or invoke the guaranty of the equal protection of the laws under the Fourteenth Amendment, but is based upon general constitutional principles of taxation expounded by the State courts in the cases therein cited. Jurisdiction in that case was founded on the diverse citizenship of the parties.

The discrimination must not be sporadic or occasional, but substantial; that is, the relative undervaluation must extend to a *large class* of individuals or corporations, and not solely to one individual or corporation.

What proof has complainant made of the truth of the allegations concerning the county assessors contained in its amended bill? Absolutely none worthy of the court's attention. Only one of the 119 county assessors in the State testified or gave an affidavit in behalf of the complainant, viz.: C. Burgess Taylor, of Mason County. The assessors are the sworn officers to whom the Constitution and laws of the State have delegated the power and authority to make the annual assessments of all property not required to be assessed by the Railroad Commission and Board of Valuation and Assessment. The presumption must be indulged by the court, as has been repeatedly decided, that these assessors faithfully discharged their official duties. The complainant has sought to impeach the integrity of their work, and that of the boards of county supervisors by the affidavits of unofficial witnesses not charged by law with the duty of assessing property for purposes of taxation.

The court can not take judicial notice of undervaluations of any species of property, if any there be, by assessing officers. That notion seems to have been entertained by some judges from what is said in their opinions in this class of cases; but it has been dispelled effectually by the recent decision of this court in *New York ex rel.* vs. *Barker*, 179 U. S. 286, above cited, as follows:

"Should this court, with reference to the action of the public and sworn officials of New York City, assume without evidence

that they have violated the laws of their State, when the highest court of the State itself refuses, in the absence of evidence, to assume any such violation? We think not.

"Nor did the Court of Appeals act upon any judicial notice of the fact of undervaluation in the case of the *Equitable Gaslight Company*, 144 N. Y. 94, 39 N. E. 13, already cited. While the assessed value was stated, the commissioners in their return to the writ of *certiorari* distinctly showed that the actual was more than the assessed value, and the only question in the case was whether in arriving at the actual value of the capital they were bound by the assessed, and could not be permitted to show the true value of the real estate. The court held they were not so bound.

"What the court remarked about the practice of undervaluation was not the basis of its judicial action, for the facts were distinctly proved. The subsequent case in 146 N. Y. 304, 40 N. E. 996, is a direct authority for the refusal to make any presumption of a violation of official duty.

"This court did not presume a violation of duty in Cummings vs. Merchants' Nat. Bank, 101 U. S. 153, 155, 25 L. Ed. 903, 904. On the contrary, the bill alleged the facts, and the testimony supported the allegations. In extenuation of the practice alleged and proved, the court remarked in passing (page 162, L. Ed. p. 906) that it was not limited to the State of Ohio, and that it was a matter of common observation that in the valuation of real estate the rule was habitually disregarded. Although the justice who wrote the opinion did speak of the fact as matter of common observation, neither he nor the court took judicial notice thereof, but only those facts which had been *pleaded*, and *testimony* to sustain which had been duly given, formed the basis of judicial action. We will not, and ought not to, presume a violation in the absence of *allegations* and *proofs* to that effect.

"Whether, if the case were proved, as assumed by counsel, it would in fact amount to any such discrimination against corporations as to work a denial to the plaintiff of the equal protection of the laws, is a question not raised by this record, and, therefore, not necessary to be decided."

Appellants filed the affidavits of twenty-four county assessors, including one of said C. Burgess Taylor, which, by stipulation between counsel for complainant and defendants, were to be read as depositions herein; and these assessors testify that they were elected to office in November, 1897, and qualified and entered upon the discharge of their official duties on the first Monday in January, 1898, and in the years 1898, 1899, 1900, and 1901, assessed all property, real and personal, tangible and intangible, assessable by them for the years 1899, 1900, 1901, and 1902, at its fair cash value, estimated at the price it would bring at a fair voluntary sale, as required by their oaths of office, and the Constitution and laws of the State. The assessors in the following counties so testified under

oath, to wit: Barren, Boone, Bourbon, Boyle, Bracken, Clark, Fayette, Gallatin, Grant, Harrison, Henry, Jefferson, Jessamine, Kenton, Lincoln, Mason, Mercer, Montgomery, Pendleton, Rowan, Scott, Taylor and Warren. (Settle's affidavit, R., 772; clause 3, stipulation, *Ib.* 828-9.)

The printed official report of the Board of Equalization for 1902, made Exhibit No. 1, with Auditor Coulter's deposition (R., 465), shows the "grand total value of all property as equalized for taxation" was $598,829,633. Of this sum, the value of the property assessed by said twenty-four assessors, as equalized by said board, in the counties above named, was $305,215,871, or more than one-half of the grand total value in the entire State, the remainder, located in the other ninety-five counties, being only $293,613,762. (R., 462-5.)

Complainant, out of 119 county assessors in the State, obtained only one (C. Burgess Taylor, of Mason County) to testify that he assessed property for the year 1902 at less than its fair cash value. (R., 604.) It must be assumed by the court that complainant, by reason of its failure to do so, was unable to procure any other county assessor in the State to so testify. Taylor gave his said affidavit for complainant on October 18, 1902; but the affidavit made by him for the defendants is dated October 3, 1902, in which he expressly stated under oath before the same notary "that for the years 1898, 1899, 1900 and 1901, he was the duly elected, qualified, and acting assessor for the County of Mason in the State of Kentucky, and that during each of said years, he and his deputies assessed all property in said county, to the best of their ability and judgment (whether owned by individuals or corporations), at its fair cash value, estimated at the price it would bring at a fair voluntary sale." (Clause 3, stipulation, R., 828; Settle's affidavit being the same, R., 772.)

The conflicting statements in these two affidavits of Taylor are irreconcilable. What he said in one is nullified by what he said in the other.

To counteract the weight of the testimony of the county assessors themselves, complainant filed the affidavits of five real estate agents, viz.: James Buchanan, T. H. Whayne, S. S. Meddis, Hardy Burton, and C. J. Meddis (R., 601-3), all of whom reside in the city of Louisville, who state in substance that in their opinion *farm lands* in the State of Kentucky have increased in value on an average since 1890 from 20 per cent. to 25 per cent. These five witnesses express no opinion as to the value of any other species of property assessable by the county assessors. It is simply preposterous for complainant to thus attempt to overcome the sworn testimony of the assessors of counties in which is located a majority in value of all the property, including farm lands, subject to taxation in the State, as well as the legal presumption that the assessors in the remainder of the counties in the State faithfully

discharged their official duties as required by law and their oaths of office. In the language of Judge Sage in *Exchange National Bank vs. Miller, 19 Fed. Rep. 375:*

"It would, perhaps, be more exact to say that the judgment of the assessors, in their *official* valuation, differs from the judgment of witnesses in their *unofficial* valuation, as expressed in their testimony."

Furthermore, it appears from Exhibit No. 1, with W. A. Northcut's deposition, taken by complainant, that the equalized average value of farm lands in this State per acre in 1889, was $9.03 and in 1902 it was $10.57 (R., 545), thus showing an increase of $1.54 per acre, or over 17 per cent., approximately the percentage of increase these five witnesses state had taken place in such property during that period. By Exhibit No. 2, with the same deposition (R., 546), it further appears that the total equalized value of farm lands in 1889 was $230,239,106, and in 1902 the value of such lands was equalized at $258,040,313, an increase of $27,801,207, or over 12 per cent. But the court's attention is called to the fact that this exhibit shows that there were assessed in 1889 for taxation 25,477,063 acres of farm lands, while, by reason of omissions or other causes, there were only 24,416,479 acres assessed in 1902, or 1,060,584 acres less than in 1889. Of course there were approximately as many acres of farm lands in the State in 1902 as in 1889, and if we assume (which seems to be a fair assumption) that the 1,060,584 acres omitted from assessment in 1902, had they been assessed, would have been of the same equalized value per acre as the acres that were assessed, to wit: $10.57, there would have been an additional increase in the equalized value of *farm lands* in 1902 over that of 1889 of $11,210,372. This latter sum added to the increase above stated of $27,801,207 makes a total increase on farm lands in said period of $39,011,579, or nearly 17 per cent., that is, the same percentage of increase shown by said exhibits in the average equalized values per acre and by complainant's real estate witnesses.

The affidavit of Huston Quin, and Exhibit No. 1 therewith filed in complainant's behalf, merely presents a calculation of values in seventeen selected counties, based on an assumption that farm lands in 1901 were equalized on only 70 per cent. of their cash value. (R., 610.) Why so few counties, and the particular counties therein named, were taken for comparison between the values in that year and 1902 is not explained. Even according to this exhibit, the equalized value of such lands in five of the seventeen counties named therein for 1902 exceeds 80 per cent. of the assumed cash value thereof, as follows: Campbell, 92 per cent.; Daviess, 95 per cent.; Fulton, 98 per cent.; Magoffin, 116 per cent., and Morgan, 85 per cent.

To illustrate the gradual increases made in the total assessments and equalized values of all kinds of property for State taxa-

tion, except the property of railroad companies (assessed by the Railroad Commission), distilled spirits and franchises of corporations (assessed by the Board of Valuation and Assessment), we have made up the following table, based on the reports of the Board of Equalization for the years 1896 (Exhibit XY with Hancock Taylor's affidavit, R., 592-99), 1901 and 1902 (Exhibit No. 2 with Ben D. Ringo's deposition, R., 753-69, and Exhibit No. 1 with Auditor Coulter's deposition, R., 401-85), as follows:

	1896	1901	1902
Total value of personal property not subject to equalization.....	$ 56,181,387	$ 64,264,316	$ 64,412,354
Total equalized value of personal property subject to equalization.....	62,043,140	70,846,267	72,557,539
Total equalized value of town lots.....	197,885,106	200,049,516	203,819,427
Total equalized value of lands	254,817,129	253,996,721	258,040,313
Grand total equalized value of all property.....	$570,926,762	$589,156,820	$598,829,633

We submit that complainant has failed to produce clear, satisfactory and convincing proof that the county assessors deliberately, intentionally, systematically, fraudulently, or as a result of a combination or agreement or design to discriminate, assessed either the real or personal property assessable by them for 1902 at 80 per cent. of, or any per cent. less than, its fair cash value, estimated at the price it would bring at a fair voluntary sale.

2. The next question to be considered, arising upon the allegations of the original bill, if deemed sufficient on demurrer to present a cause of action in complainant's behalf, within the jurisdiction of the Circuit Court, is whether or not the Board of Equalization intentionally equalized the assessments of all property coming before said board for 1902 on the basis of 80 per cent. of the fair *cash* value of such property. A large mass of testimony, with voluminous exhibits, has been introduced by both parties on this branch of the case. We will not undertake to discuss this testimony in detail, but shall give the court our views concerning the substance and effect of the same in a general way.

The complainant has taken the depositions of only six witnesses in this action, viz.: W. P. Thorne, Jr., assistant secretary of the

Board of Equalization (R., 30-64, 112-17); T. C. Albritton, corporation clerk in the auditor's office (R., 64-67); Gus. G. Coulter, auditor (R., 67-99); L. C. Norman, ex-auditor (R. 100-104); Samuel H. Stone, ex-auditor (R., 105-11); W. A. Northcut, clerk in the law department of the complainant company (R., 104-5); and Thomas B. Harrison, attorney for complainant (R., 117-40). The court will find that a large part of these depositions has little or no bearing upon the issues involved herein. Many of the exhibits and verbal statements of the witnesses are based on hearsay, and utterly incompetent. By said Thorne and Coulter the attempt is made to sustain the allegation that the Board of Equalization established a rule to equalize assessed values on a basis of 80 per cent. of the *cash* value of the property assessed; but when their testimony is examined it will be seen that they have reference to *transfer* values, instead of *cash* values. Complainant employed Thorne for two or three months to get up the exhibits he files with his two depositions with respect to the action of the Board of Equalization, and showing numerous calculations of his own, which are more apt to confuse than enlighten the court upon the real issues presented by the pleadings in this action. He states (R., 36) that said board had before it the recapitulation sheets, that is, the assessors' books, and the transfers from most of the counties. He admits that where, in his main examination, he speaks of "cash" value he means "transfer" value, whether the consideration stated in the transfer, as certified by the clerk, was in cash or on time, with or without interest. (R., 37.) The comparison, of course, between the assessed and transfer values was, in all cases, necessarily limited to the particular lands or town lots transferred. For sundry reasons these transfers did not certainly or satisfactorily indicate the true cash value of the real estate conveyed, but they proved very uncertain and unreliable. They constituted but one of the many factors used by said board in reaching its final conclusions. Owing to these uncertainties, growing out of these transfer sheets, representing at best but a small part of the lands and town lots in the several counties, the transfer values, as stated in them, were scaled or discounted 20 per per cent., leaving 80 per cent. thereof as a reasonable estimate, all things considered, of what was the fair *cash* value of the real estate covered by such transfers. Thorne admitted (*p. 18*) the transfer sheets often showed the property was sold on time, and sometimes given away, and frequently the assessed value thereof exceeded the *recited transfer* value. (R., 38.)

Auditor Coulter is an ex-officio member of the Board of Equalization, but attended its sessions in 1902 but very few times, as he admits. (R., 70.) He states the board undertook to ascertain what was 80 per cent. of the considerations recited in the deeds for lands and town lots, as certified, and that, together with the five years' tables of past experience, as he "*understood*, was made the standard

of measurements to equalize property by, that is, real estate." (R., 67, 68.) He admits that wherever 80 per cent. of these transfers was mentioned it might have been the understanding of the other members of the board that it was the method used to arrive at the fair *cash* values. (R., 71.) His testimony further shows that a great many witnesses from different parts of the State came before the board and testified with respect to real estate values in their respective counties, and in many instances preliminary raises, of which notice had been given, were lowered or taken off entirely because of the testimony of such witnesses, while as to many other counties they were adhered to. From Section 4058, Kentucky Statutes, he testified that the assessed values of *eleven* different items of intangible personal property were *not* subject to equalization by the board, and the same, as fixed by the county assessors, are not affected by the action of said board. (R., 73.) As to the assessed value of all other personal property, there is added the same percentage of increase finally fixed by said board on farm lands in the same county. This is done in obedience to Section 4275, Kentucky Statutes, *arbitrarily*, and regardless of whether such personal property has been assessed at its fair cash value or not by the county assessors. (R., 73.)

Upon an examination of the report of said board for 1902 it will be seen that the assessed values were not *reduced* on lands, town lots, or personal property in any county in the State; that the assessed value on town lots in forty-one counties was *increased* by various percentages, and left, as assessed by the county assessors and equalized by the county boards of supervisors, in the other seventy-eight counties (*pp. 78-81; R., 458-61*); and that the assessed values of lands and personal property, subject to equalization, were *increased* in seventy-three counties, and left as assessed and equalized by the county officers in the other forty-six counties. (*pp. 82-85; R., 462-65.*) The results of these increases are as follows:

Town lots, equalized value (*pp. 78-81; R., 458-61*),	$203,819,427
Town lots, assessed value (*pp. 74-77; R., 454-57*),	202,136,817
Increase, - - - - - - - - -	$1,682,610
Farm lands, equalized value (*pp. 86-89; R., 466-69*),	$258,040,313
Farm lands, assessed value (*Ib., 86-89; R., 466-69*),	250,247,168
Increase, - - - - - - - - -	$7,793,145
Personal property subject to equalization, equalized value (*pp. 82-85; R., 462-65*), - - - - -	$72,557,539
Personal property subject to equalization, assessed value (*pp. 78-81; R., 458-61*), - - - - -	70,967,439
Increase, - - - - - - - - -	$1,590,100

These increases by the Board of Equalization for 1902 aggregate $11,065,855. (*Ib., 85; R., 465.*)

The only testimony introduced by the complainant concerning the action of the Board of Equalization, beside Thorne and Coulter, consisted of the affidavits (all stating practically, if not exactly, the same) of forty-five persons that were witnesses before said board in 1902. (R., 586-89; clause 2 of stipulation, R., 827-28.) These witnesses were from only twenty-six counties. Each of them in substance states that "he observed the methods of the board and watched its proceedings while he was present; that the representatives of the county were *given to understand* by the chairman and other members of the board that the purpose of the board was to equalize the assessments in the county on the basis of 80 per cent. of the *transfer* value of the land; that all of the discussions between the witnesses and the members of the board were with reference to that basis; and the *purpose* on the part of the witnesses was to show that the average assessments in the county were as nearly up to that basis as they could show, and upon the part of the board this evidence was listened to with the *understanding* that it was only the *purpose* of the board to bring the equalization up to 80 per cent. of the *transfer* value." (R., 586-89.) There is not the slightest intimation in these affidavits that said board had adopted or followed a rule to equalize the assessments on the basis of 80 per cent. of the fair *cash* value of the property assessed. Indeed, it might be fairly assumed that every one of these witnesses testified on oath before said board that the assessments of property in their respective counties were up to the fair *cash* value thereof, as required by law. Hence, neither of them would testify in his affidavit that the property assessed in his county was equalized on any other basis than what was deemed by said board to be its fair *cash* value. The absence of such testimony from these witnesses is very significant.

In the report of said board for 1902 there is a list published of the counties and the names of the witnesses who appeared therefrom, as well as those from which no witnesses testified before said board. (R., 398-400.) From that list it appears witnesses came from *fifty-seven* counties, while none appeared from the other *sixty-two* counties. The affidavits filed by complainant are from part of the witnesses that represented only *twenty-six* counties. None of the witnesses that went before the board as representatives of the other *thirty-one* counties named in said list has testified at all. On the other hand, appellants took the depositions of *six* out of the *seven* members of the Board of Equalization, viz.: Ben. D. Ringo, chairman; William T. Walker, William A. Eubank, M. J. Meagher, John Barber, and John G. Evans (R., 676-718), as well as that of James H. Dale, the chief secretary of said board. (R., 738-46.) A careful reading of these depositions will convince the court that there was no rule or

principle adopted or followed to equalize assessments on the basis of 80 per cent. of the fair *cash* value of the property assessed, or at any per cent. less than its full value. Each of them testifies that his effort and that of the board was at all times to equalize such assessments on the basis of what they believed in good faith, from all the facts before them, was the fair cash value of the property assessed in the several counties. Such was their constant purpose, and they faithfully labored for more than four months (from February 10th to June 20th) to accomplish that end, under their oaths of office, with a full knowledge of the standard of value required by the Constitution and Statutes of the State.

Judge Walker, of Hickman County, being asked as to how the board reached its conclusion, states (R., 677):

"The first thing we did when the board met, we went to work on the assessors' books—their reports. They sent them in in book form, together with the books, they sent in a list of the transfers of town lots and farming lands. We first went through the books and saw that they were correct in their footings. Where they were not, we corrected them. Then we took up the transfers, and where there were as many as five, as the law stated, we considered them. If there was not as many as five, they were thrown out and no consideration paid to them. We took as a basis five years back. We would go back with the books we had in hand, and four years back of that, and we would make an average statement for the five years; then we would compare our assessments in hand with the one year previous; then where there was enough of these transfers we would take them up and they also entered into it; and we got up a preliminary sheet and notified each county judge of our preliminary action, whatever it was; and then that county judge, if they did not accept our preliminary action as final, would send witnesses here. Those witnesses would come, and sometimes our preliminary action was changed, and sometimes it stood as final; and those sheets of transfers were very little help to us. It was a heap of work, but we found them deficient in the sales. In places we could not tell—the witnesses would generally throw out about half of those transfers, and after we heard from them there would frequently be a small proportion of them left. We got those transfers down to what we thought was the equalized value or the worth of the property, and we took those transfers on a basis of 80 per cent., bringing, as we thought, the property down to what it would be worth at a fair *cash* value on voluntary sale. That was the only part of our work where the 80 per cent. entered into it at all. I know it was the intention of that board always to list it, as the law says, at what it was *worth*."

Further on, being asked if the board adopted any rule or principle by which it was governed to equalize the farm lands and town lots, the assessments of which came before the board for con-

sideration, on the basis of 80 per cent. of the fair cash value of said property, he answered (R., 678):

"No, sir; we did not. We tried to follow the law. If you remember, under some old act there was a law in there of 69 per cent., and they said that was a mistake, and then it was changed to 70 per cent., and frequently there would be a committee come before us who would refer to that 70 per cent. basis. Mr. Ringo, if he was there, would tell them that that had nothing in the world to do with it, and he would refer to the law where it said that this property should be listed at its fair cash value; and I know when he was not there the members would honor me by making me chairman for the time being, and I would call their attention to that and would invariably do that; that I was not trying to list property at 69 or 70 or 80 per cent., but at what it was worth; that that was our object, and that we wanted to figure these transfers on that basis, because there were so many of them on long time, without interest, and so many different kinds of sales; that we wanted to figure them at 80 per cent. to get at what we thought was a fair *cash* value."

Mr. Eubank, of the city of Louisville, being asked substantially the same question, responded (R., 691):

"No such rule was adopted by the board; no such rule was followed."

Then he was asked what consideration was given to the transfer values that were certified from the several counties. He answered (R., 691-2):

"The board, in making up its report, took into consideration these transfers for the purpose of arriving at the actual value of this property in these counties, using these transfers as an evidence to arrive at the actual *cash* value as far as it could. Then the next point would be to take up the assessments for former years of land in the county, and, after arriving at our preliminary action, which, as a general rule, was higher than the facts and evidence we had before us at that time would justify, after giving notice of our preliminary action, we heard delegates from any counties that felt disposed to send them, and their evidence, as a general rule, would begin with the transfers. They would explain them.

"We would explain to them about the transfers, the various ways in which we arrived at the value of the property, that their property at no time had been assessed as high as it ought to be, that they had various improvements in the way of railroads, street cars, etc., that would justify a raise, and that their transfers indicated it—if they did so indicate—that their property was not assessed at its full value, and we would hear what they had to say first in reference to the transfer. If there was an item of property assessed at more than its actual cash value, we would ask them why it was, and we usually found that there was some improvement that had been made upon the property between the time of the sale of the property and the assessment following, and in many

cases we would strike out items where property had sold at three times the assessment. They would insist upon us counting that, claiming that it would cut down their average. In getting at the values from the transfers, we would find in many cases that they were fictitious, and no cash had passed, so that the board would simply consider such cases in the transfers as they thought showed an actual *bona fide* sale for a money consideration."

When asked if there was any percentage or unvarying rule of the board concerning transfer values, he further stated (R., 692):

"Only to this extent: That the board considered that, in order to get at the cash value from the transfer sheets, there being so many love and affection transfers embraced, where no consideration was paid, and where there was a time sale, that we ought to allow a discount in order to bring the *sale* value down to the actual cash basis, and we usually figured along that line, considering 20 per cent. off or discount from the sale price would about bring it to that point."

He stated, as a rule, it could not be ascertained from the transfer sheets how long a time the sales had been made on or whether the notes bore interest or otherwise, and added that in some cases these sheets would state one, two, three or five years equal payments, and in others it would be recited that the transfers were for cash, or cash and notes, or notes altogether. (R., 692.) With respect to the witnesses who came before the board he stated in substance (R., 693-4):

These witnesses would invariably contend that the property in their counties was assessed sufficiently high, and 90 per cent. of them would contend that such property was assessed at more than it would bring, and when the members of the board asked the question, if all the property in the entire county were sold, would it bring more than the assessment, the invariable answer of the witness was that they did not believe it would bring as much money as it had been assessed for. He also testified that his object and that of the board was, as far as possible, to comply with the law which required property to be assessed at it full *cash* value, and that the board labored to reach that end from the information before it.

Mr. Meagher, of Frankfort, stated (R., 699) that the object of the members of the board was to fix the assessed property at its fair *cash* value, and that in the first meeting of the board, in the year 1901, the subject was discussed by the board, and it was then agreed by all that they would assess property at 100 per cent., and that there was no rule or principle on which the board thereafter acted, to fix the value of the farm lands and town lots at 80 per cent. of their fair *cash* value, and nothing of that kind was ever discussed or talked about as a rule to govern the acts of the board; that at all times he and the other members of the board, in good faith, undertook to follow the provisions of the law, and fix the

value of all property at its fair value in cash, estimated at the price it would bring at a fair voluntary sale. He further referred to the fact (R., 700) that Mr. Ringo, the chairman, as a general thing stated to the witnesses when they appeared, after giving them the transfers to go over and see what they could figure out of them, that to remove any fictitious or commissioner's sales, etc., that the board would allow 20 per cent. on the *transfers*, as certified, not that the law so stated, but as a means of reaching what was considered the fair *cash* value of the property assessed. He further stated that the transfers as certified were given some attention at the board's session in the year 1901, but thereafter the members of the board made up their minds in 1902 that the said transfers were very unreliable, and the witnesses were given to understand that the board was not figuring on 80 per cent., but on a fair *cash* value. (R., 700-701.)

Mr. Barber, of Elliott County, stated that the board made very little use of the transfers, that there never was, at any time, any purpose on the part of the board to equalize the assessments of property on 80 per cent. of the fair *cash* value of the property assessed. With respect to the values placed on lands in his section of the State he said (R., 702):

"Most of them, as far as my knowledge extends, were assessed at more than they would bring at a voluntary sale. There were some few instances where they were not assessed full; but as a general rule the property in my section of the State can all, or nearly all, be bought for less money than they are assessed for. They are all small taxpayers."

Mr. Evans, of Morehead, testified that there never was any rule or principle established by the board at any time in the year 1902 to fix the values of farm lands and town lots at 80 per cent. of their fair *cash* values. Concerning the transfer sheets he stated (R., 704):

"We used them as a basis for arriving at the values, but we did not consider them very valuable in that respect. We thought they were very uncertain, and they proved to be so when the witnesses would testify."

He added, when asked if any estimate was placed by the board on such transfer values:

"The 80 per cent. was talked of, and I noticed a number of times that the witnesses would come before the board; we would give them the transfers, and they would look over them and say, 'We have 80 per cent. of them all right'; and we would say, that is not the law, and we would turn them to the law and would tell them that it had to be fair *cash* value, and not 80 per cent."

Mr. Ringo, of Hartford, the chairman, a lawyer by profession, testified that he had been a member of the Board of Equalization two years, and was formerly a member of said board for a like period. He testified concerning the duties of the board as follows (R., 706-7):

"The nature of our duties, as we conceived it, was to reach an equalization of the burdens of taxation among the various counties of the State, and it was the constant purpose and effort of the board to distribute, as near as possible, the burdens of taxation uniformly among the counties relative to the *real* values of property assessed in the counties. In order to attain this, the board gathered all the evidence it could on the subject of these values, both record evidence and other evidence, and acted on such evidence as it could gather in addition to the personal information of members of the board on these subjects, and we attempted to fairly equalize the valuation of the taxable property in the various counties."

Being asked concerning what use was made of the certified transfers, he answered (R., 706):

"We considered these lists as one element in the evidence upon which we acted in reaching a conclusion upon any county, when we thought they were entitled to any credit as evidence. Sometimes we were compelled to disregard them entirely and base our findings on other kinds of evidence."

Being asked what condition these transfer sheets were in when placed before the board, he said it could not be determined sometimes as to what the terms and conditions were on which the sales had been made, or at what value the property had been transferred; that they were crudely prepared by the clerks, and the recitals in the deeds were not copied into the transfers; and in such instances resort had to be had to other means of ascertaining the facts from such counties; that as a rule the board was wholly unable to ascertain whether the deferred payments bore interest or not; that sometimes the clerk would state that the notes bore interest, but the contrary was generally the practice, that is, the transfer sheets showed nothing about interest or the time on which the deferred payments were to run. Again, he stated, with respect to these transfer values (R., 707):

"From experience in these matters, the board had learned that a great many of the transfers certified up to us by the clerks from the various counties were not in fact fair sales for cash or its equivalent. Many times they were exchanges of property, or considerations of love and affection entered into these sales, and we found it to be true generally that in the clerk's office the recitals in the deeds can not be taken as wholly true. The board, in order to make allowance for these fictitious values, and other uncertainties concerning the truthfulness of the recitals in the deeds, agreed that about 80 per cent. of the recited consideration would be a fair comparison to use in work on this table of transfers, and for a number of years, I do not know just how long, the board has been working this table, taking first 80 per cent. of the recited consideration, as set forth in the deeds, and comparing that with the assessed value of the same property."

When asked what the purpose was of scaling these transfer values 20 per cent. or placing them on a basis of 80 per cent., he answered (R., 707):

"We were endeavoring to reduce the recited consideration as near as we could to what the board conceived to be a fair *cash* basis for the sales, considering these elements I have already mentioned, and the further fact that many times there were deferred payments without interest, and things of that kind of which the board could not have accurate knowledge, and the opinion of the board generally has been that by scaling it 20 per cent. we would approximate very nearly to what was the *real* consideration paid for the property."

As to the oral testimony of the witnesses, and the weight given to the same, he stated (R., 708):

"Acting on the evidence before us, the board fixed the preliminary action on the assessment of each county and notified the county judge of its preliminary action and invited him to present witnesses before the board and fix a time for hearing, and on the day fixed for a hearing of each county the board would take up the assessment and consider it. If witnesses appeared, as they generally did where the raise was at all considerable, these witnesses were *sworn* and their testimony taken by the board, and after hearing it, the board revised the valuation for that county, acting on *all* the evidence it had before it, frequently changing its preliminary action."

Mr. Dale, of Shelbyville, the chief secretary of the board, fully corroborated the testimony of the members of the board in all respects concerning the use made of the transfer sheets, and stated that there was never any rule or principle established by the board by which it equalized the value of lands or town lots on the basis of 80 per cent. of their fair *cash* value. (R., 740-41.)

In the published report of the Board of Equalization for the year 1902 (R., 393-97) will be found an address by Mr. Ringo, the chairman, attested by Mr. Dale, chief secretary, wherein this language occurs (R., 393):

"It is exceedingly unfortunate that by an oversight the first portion of Section 7 of the act creating this board has been allowed to remain a part of the statute. Of course, all well informed officials understand that so much of this act as directs or seeks to allow this board to fix values at anything less than what the property valued would bring at a fair voluntary sale is wholly nugatory, as it is in direct conflict with the provision of the State Constitution as well as with other sections of the revenue law, the provisions of both of which will be found herein. Reference, however, to a 70 per cent. basis serves sometimes to mislead those who have not been charged with the duty of familiarizing themselves with these matters. It is for this reason that this board desires again to emphasize the fact that in this State, since the adoption of the present

Constitution, no assessor is authorized to accept a list of property at other than its fair *cash* value, estimated at what it would bring at a fair voluntary sale. Such is the law and such is the oath each assessor in the Commonwealth takes when he enters upon the discharge of the duties of his office."

Section 7 of the act of 1888, creating the Board of Equalization, there referred to by Chairman Ringo, is the same as Section 4274, Kentucky Statutes, copied into complainant's bill (R., 4), and the 70 per cent. clause therein (theretofore declared to be unconstitutional by the Court of Appeals of Kentucky) was inadvertently, or by "oversight," as stated by Chairman Ringo, carried into the general revenue law of March 29, 1902, as a part of Section 7, Article 16, thereof, which section is now Section 4274, Kentucky Statutes (edition of 1903). The Board of Equalization in 1902, however, discharged their duties in equalizing assessments for that year without reference to said act of March 29, 1902, the lawful provisions of which did not become effective until June 17, 1902, or a few days before the final adjournment of said board.

This address, written and placed, as he states, in the hands of the chief secretary for publication with the report before the final adjournment of the Board of Equalization, on June 20th, and, of course, prior to the institution of this action, together with the circular letter dated August 1, 1902, filed as Exhibit No. 1 with Mr. Ringo's deposition (R., 748-9) written without any knowledge of the nature of this suit, furnishes conclusive evidence that he, as chairman, and the other members of the said board, had in good faith labored, and were continuing their efforts, to bring the assessments up to the fair cash value of the property assessed, and to impress upon the county assessors throughout the State the necessity of faithfully discharging their official duties in this respect. Substantially the same address had been made to the assessing officers throughout the State in 1901 by Chairman Ringo. (R., 749-52) It is impossible for any one to read these communications without being convinced that the allegation in complainant's bill that said board equalized the assessments of property that came before it in the year 1902 on the basis of 80 per cent. of its fair *cash* value has no foundation in fact.

In *Louisville Railway Co.* vs. *Commonwealth*, *105 Ky.*, *710*, decided February 17, 1899, after quoting certain sections of the Kentucky Statutes, the court said (*Ib.*, *717-18*):

"Considering Sections 4273, 4274 and 4275, Kentucky Statutes, together, it is not unreasonable to conclude that the Board of Equalization and Assessment was only authorized to take 70 per cent. of the *transfer* values of property and equalize assessments upon that basis, and not upon 70 per cent. of the *cash* value. It is a matter of history—perhaps we can not take judicial notice of the fact—that the board has always *increased* the total value of the assessment of real and personal property in the State. How-

ever, it is unimportant to consider that question further, as the act creating the Board of Equalization and Assessment *is not in force* in so far as Section 172 of the Constitution and Section 4020, Kentucky Statutes, are in conflict therewith. In other words, the Board of Valuation and Assessment can not equalize except upon a basis of the *cash* value of the property assessed. If it attempted to do otherwise, any taxpayer of the State could, by appropriate proceedings, restrain it from doing so."

After this decision, binding as it was on all assessing officers in the State, there could be no longer any doubt of the unconstitutionality of so much of Sections 4274, 4275 and 4276, Kentucky Statutes, as apparently directed the equalization of the values of property by the Board of Equalization on the basis of 70 per cent. of the cash value of the property assessed. Hence, the members of said board, in view of the decision in the case last cited, treated said statutory provision (enacted originally as it was prior to the adoption of the present State Constitution) as null and void. (*Ringo's Depo, R., 717.*)

The decision last cited was followed by that in *Owensboro Water Works Co. vs. City of Owensboro, 24 Ky. Law Rep. 2530*, decided May 20, 1903, wherein the court, speaking of the 70 per cent. provision in Section 4274, Kentucky Statutes, said (*Ib.*, 2532):

"This is a provision of the act of May 4, 1888, and has been superseded by Section 172 of the Constitution, by which all the property not exempted from taxation must be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and it is the duty of the board and all other officers now to comply with the provisions of the Constitution. The act of 1888, in so far as it is in conflict with the provision of the Constitution, is no longer in force. Appellant can not, therefore, complain of the assessment of its property by the Board of Valuation at its fair cash value."

The seventh member of said board, Mr. George L. Willis, of Shelbyville, the record shows, was in ill health, and rarely attended its sessions. His deposition was not taken by either party. So, as far as the proceedings of the said board, and the methods employed by it to reach its conclusions, are concerned, complainant presented for the court's consideration the testimony of Auditor Coulter, ex-officio member, who was present only two or three times in four months, and Mr. Thorne, one of the assistant secretaries of said board; while the appellants introduced the testimony of six out of the seven other members, including the chairman of said board, who regularly attended its sessions and actively participated in its work for the year in controversy. In other words, although the complainant had the burden of proof to establish the truth of the essential allegations of its bill, the appellants assumed and successfully discharged such burden by the preponderance of the testimony showing said allegations are untrue.

3. But complainant's counsel brought into this case a large number of affidavits taken and filed in other cases in 1898, then pending in the Circuit Court of the United States for the District of Kentucky. These actions were brought by certain banks, and the Louisville Trust Company, against Samuel H. Stone, auditor, and the treasurer and secretary of State, then in office, constituting the Board of Valuation and Assessment, to enjoin the said board from apportioning and said auditor from certifying the assessments of said complainants' franchises for the years 1897 and 1898, on substantially the same grounds as are alleged by complainant in the case at bar. The same counsel that brought the actions mentioned, now represent the complainant in this action. The said cases were heard together in the court below (Judge Clark presiding), on the application for a preliminary injunction, which was refused on the alleged ground that complainants had been denied by said board the equal protection of the laws, under the proof made by the parties in the form of affidavits, which, by stipulation between counsel, were read as depositions in those cases. In one of these actions an appeal was taken from the order refusing the injunction prayed for on the ground last mentioned, and the opinion of the Circuit Court of Appeals, rendered by Judge Day, has been reported. (*Louisville Trust Company vs. Stone, Auditor, et al., 107 Fed. Rep. 305.*) The claim was made in the cases referred to that the county assessors had systematically, intentionally and illegally undervalued, for the years 1897 and 1898, the property assessed by them, and that the Board of Equalization had equalized such assessments on the basis of only 70 per cent. of the fair cash value of the property assessed; that the Board of Valuation and Assessment had assessed the franchises of the complainants at their full cash value; and that they had thus been denied the equal protection of the laws, guaranteed by the Fourteenth Amendment to the Federal Constitution.

In support of these allegations, complainants took the affidavits of sundry officials and ex-officials, which were withdrawn from those cases and filed by complainant as evidence in the case now under consideration. The statements in said affidavits were excepted to by the appellants herein for incompetency and irrelevancy. (*Exceptions Nos. 1 and 2; R., 784.*) In the decree appealed from the court below overruled said exceptions. (Clause 2, R., 788.) This ruling is one of the errors assigned by appellants. (R., 824.) We will discuss this incompetent and irrelevant testimony as briefly as possible.

Mr. George L. Willis, who was a member of the Board of Equalization in 1898, stated (R., 605) that said board endeavored to equalize individual assessments by counties at a fair cash value, but owing to the fact that the assessors had assessed property below 70 per cent. of such value, said board found it impossible to equalize property as a rule at only 70 per cent. of its fair cash

value, and was unable to equalize the same above such per cent. of the cash value. Ex-Auditor Norman stated (R., 606) that he was in office from 1889 to 1895, and that said board endeavored in good faith to equalize assessments in the manner provided for by the statute under which said board was constituted. He further stated that the year preceding September 15, 1896, was one of very great and unusual depression in all property, and especially real estate values, in this State, it being very difficult to sell real estate during that period, except at a sacrifice and much below its real value.

L. C. Pritchard, a member of said board in 1895, 1896, stated (R., 606) it endeavored in good faith to carry out and execute the provisions of the statute prescribing its duties and to equalize the assessments in the State in the manner and on the basis prescribed by said statute.

Hancock Taylor, a member for the years 1895, 1896; John M. VanMeter, a member in 1896; John S. Phelps, a member in 1893, 1894, 1895; Jos. I. Murray, a member in 1894; and Ben D. Ringo, a member in 1895, 1896, all made the same statements as were contained in said Pritchard's affidavit. (R., 607-9.)

In addition, complainants in said cases took eighty-two other affidavits of sundry persons, composed of twenty-one sheriffs, five deputy sheriffs, one Circuit Court clerk, seventeen county judges, twenty-one county clerks, one deputy county clerk, two assessors, four deputy assessors, five county supervisors, three county attorneys, one police judge, and one magistrate, which were filed by appellee as evidence in the case at bar and excepted to by appellants, as above stated, each of whom stated in substance that the property of individuals in his county had not been assessed at more than 70 per cent. of its cash value. These affiants were from fifty-seven, or less than one-half, of the counties in the State. (James M. Shive's affidavit, R., 675; clause 2 of stipulation, R., 828.)

On the other hand, the defendants, in opposition to the injunction sought in said cases, produced and filed the affidavits of the following officials, which appellants read as evidence in the trial of the case at bar, to wit: John L. Scott, Jr., chief secretary of the Board of Equalization in 1897 and 1898; A. R. Dyche, H. C. Martin, W. O. Bullock, members of the Board of Equalization, and Samuel H. Stone, auditor, in 1897-8.

Scott stated (R., 774-76) that W. A. Bullock, H. C. Martin, Edward Parker, and Robert McMichael were the four members who qualified and constituted said board on February 10, 1897; that said Parker resigned March 19, 1897, and A. R. Dyche was appointed and then qualified to fill the vacancy; that the same four members qualified and constituted said board on February 11, 1898; that said McMichael died on March 9, 1898; and on March 12th George L. Willis was appointed and then qualified to fill the

vacancy. He further stated that on February 10, 1897, by a unanimous vote, the members of said board decided that Section 172 of the State Constitution should be recognized in making equalizations, instead of Section 2, Chapter 1903 of the Act of May 27, 1890 (*now 4247, Kentucky Statutes*); that all counties whose average lists of real property appeared to be assessed below its fair cash value should be raised to that value, and all those whose average lists were above such value should be lowered to that value; that when said board met in February, 1898, it readopted the action of 1897, and in all of its equalizations for 1897 and 1898 said board followed said rule; that he made all the calculations used by said board, and made a table showing a fair cash value of lands and town lots separately in each county for the preceding five years, ascertained what the average for each year was, also what per cent. should be added to or deducted from farm lands or town lots to place the same at said average; that a like calculation comparing two years, 1897 and 1898, was made, and these tables were laid before said board, which passed preliminarily upon the several counties; that he mailed notices to the county judges, notifying them of the action of the board and fixing a day on which witnesses, not exceeding five, one of whom should be the county assessor, would be heard. On the dates fixed the various witnesses appeared and testified under oath; each assessor who appeared and testified was asked whether he assessed the property in his county at its fair cash value, or at what per cent. of the same he made his assessments on, and, with the exception of one or two, all of them swore that they based their assessments upon what the property would bring in cash at a fair voluntary sale; that, after hearing all the proof obtainable, the board passed finally upon the several counties, and in every county endeavored to equalize the property, based upon the proof and tables before it, at what said property was worth in cash, estimated at the price it would bring at a fair voluntary sale, and when the additions to and deductions from the assessments in the various counties were extended, the results were certified to the auditor.

A. R. Dyche, H. C. Martin, and W. A. Bullock, being three of the four members who served upon the Board of Equalization for the years 1897 and 1898, each stated (R., 776-7) that the rule of the members of said board in said years was to fix the value of all real estate, personal property and town lots in every county in the State, subject to taxation, at its fair cash value; that the board, from all the facts and evidence it could obtain, fixed the value of such property at its fair cash value, estimated at what it would bring at a fair voluntary sale in cash, and that in no county did said board ever fix the value of real or personal property at 70 per cent. or any per cent. less than 100 per cent. of what the board thought was its fair cash value.

The defendants in said actions also filed the affidavits of the county assessors from one hundred out of the one hundred and nineteen counties in the State who were in office from January, 1895, to January, 1898, or the period during which the assessments were made for the years 1897-1898. In these affidavits each of said assessors stated in substance that the real and personal estate in his county was, during the period he was in office, assessed by him for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; that there never was any general understanding among the assessors or between them and the taxpayers that property should be assessed at less than its cash value at a fair voluntary sale, nor did such custom ever obtain in his county so far as he knew; that there were doubtless instances where some property was assessed at less and some at more than its cash value, but on a general average property in his county was assessed at its fair cash value. (W. F. Staple's affidavit, R., 773; clause 4 of stipulation, R., 829.)

Said defendants also filed the affidavits of fifty-five former County Court clerks, who were in office during the years 1895, 1896 and 1897, each of whom stated that he was Clerk of the Board of County Supervisors of his county and was familiar with the workings of the same; that, as he understood it, said board endeavored to fix the value of the real and personal estate at its fair cash value, estimated at the price it would bring at a fair voluntary sale; that is to say, where they discovered that property had been listed at less than its cash value at a voluntary sale they raised it to the same, and where it had been assessed in excess of such value they decreased it to that point; and that, according to his judgment, on a general average, the assessment of property in his county during said years was fixed at its fair cash value, estimated at what it would bring at a fair voluntary sale. (P. H. Thomas' affidavit, R., 773; clause 5 of stipulation, R., 829.)

The defendants in said cases also filed the affidavits of sixty-six County Court clerks, who were then in office during the year 1898, whose statements were the same as those of the former county court clerks above mentioned. (R. B. Justice's affidavit, R., 774; clause 6 of stipulation, R., 830.)

The affidavit of Samuel H. Stone, then State auditor, was also filed in said actions, together with an exhibit attached thereto, by which it appears that the total equalized value of property in the State for the year 1897 was $549,419,980, and for 1898 $552,957,768, a gain of $3,537,788. (R., 778-81.)

It will thus be observed that the equalized value of all property in the State for the year 1902, $598,829,633, exceeds such value of all the property in the State for the year 1897 by $49,409,653, and that said total equalized value for the year 1902 exceeds the the total equalized value of all property in the State for 1898 by $45,871,865. The increase, therefore, of the total equal-

ized value of all the property in the State assessed by local assessors in 1902 over 1897, or during a period of five years, is 9 per cent., and the increase of such value of property thus assessed in 1902 over 1898, or during a period of four years, is over 8 per cent.

In the opinion of Judge Day all the testimony introduced by the complainants in said actions to sustain their contention was "weighed in the balances and found wanting." After stating the number and official character of the witnesses who had testified and the substance of their testimony, he announced the conclusion of the court as follows (*Louisville Trust Co. vs. Stone, Auditor, et al., 107 Fed. Rep. 308*):

"Upon consideration, the proof seems to us to fail to make out a case by that preponderance of evidence which is required by a court of equity to justify interference with the action of the State officers in making the assessment of complainant's property. Every presumption is in favor of the propriety of their action. Errors of judgment on their part will not be enjoined. The proof must be clear and convincing that a systematic discrimination is being made against complainant before a Federal court will interfere by injunction with the assessment of taxes and the collection of revenues of the State. Great stress is laid on the part of complainant upon the facts stated and deductions to be made from the affidavits of Mr. Johnson. It is true that the year concerning which he testifies shows a percentage not far from 71.89 per cent. of the sale values to have been the assessed value for that year. Also the tables for the years 1894 to 1898 show little change in the assessed value of farm lands in Kentucky.

"The argument is that such valuations are inconsistent with the change in the method of assessments alleged to have been adopted by the Board of Equalization for the years 1897 and 1898; that such uniformity shows that the 70 per cent. plan must have been pursued during all the years. There is much force in this argument. If the *testimony* before the Board of Equalization for each of those years was before us for comparison with the results reached, it would be much more convincing, and the result might be a demonstration of one theory or the other. We have not the testimony. We do not know what the proof shows for any given year. It may be that the depression in values for the years 1897 and 1898 would make the fair value for those years not far from 70 per cent. of the value of previous years. The conclusiveness of these tables depends upon the character of the testimony before the board for each of the several years. Not knowing what the testimony was, we do not feel justified in setting aside the *sworn* testimony of the great majority of the officers concerned that the lands were valued at their fair cash value. While Mr. Scott says a table was used in fixing valuations, he also adds that other testimony was adduced before the board. We are not satisfied that the allegations of the complainant of *unjust dis-*

crimination against it have been made out by the convincing proof required, and we think the learned judge who heard the case in the court below was justified in withholding the injunction asked upon this ground."

The complainant in the case at bar did not see proper to file as evidence the affidavits of Mr. Johnson referred to in Judge Day's opinion; nor did complainant produce in the present case *the sworn testimony of the witnesses who testified* before the Board of Equalization concerning the assessments for 1897, 1898, and 1902.

The only possible value to be attached to the testimony contained in these affidavits that were taken *prior* to the institution of this action in the cases above mentioned, and which were filed herein by the complainant and defendants, respectively, was to establish a comparison between the assessments of property as equalized by the Board of Equalization in the years 1897 and 1898, respectively, with the equalized values of like property for the year 1902. In other words, complainant's counsel contend that property was assessed and equalized in this State during the years 1897 and 1898 on the basis of 70 per cent. of its cash value, while the appellants contend that in those years the same was equalized at 100 per cent. or its full cash value.

In the opinion of the Circuit Court of Appeals, delivered by Judge Day, in the case last cited, the effect of the testimony contained in said affidavits was finally and conclusively determined in favor of the proposition that the values of property as assessed and equalized in the years 1897 and 1898 were *not* on the basis of 70 per cent. of the cash value of the property assessed, but on the basis of its *full cash value.* If, then, the values as equalized of property in the years 1897 and 1898 were the fair cash value of the property then assessed and equalized, the percentages of increase above stated (9 per cent. and 8 per cent., respectively) in 1902, are natural and reasonable increases in the *fair cash value*, of all the property in the State during the periods which had elapsed, to wit, four and five years.

The learned circuit judge, in his lengthy opinion upon this branch of the case, reviews the history of revenue legislation in the State of Kentucky, compares the several reports of the Board of Equalization concerning the assessments made in prior years, as far back as 1891, with that for the year 1902, lays great stress on the affidavit of one assessor, the only one filed in evidence by appellee, indulges in expressions of doubt and suspicion concerning the testimony of appellants' witnesses, advances many theories, and makes a great number of intricate calculations, before reaching his conclusion that the property in the State of Kentucky, subject to the jurisdiction of the Board of Equalization, was assessed by the local assessors at not exceeding 80 per cent., and that said board equalized such assessments at not exceeding that percentage of fair cash value for the year 1902. (R., 789-811.)

He practically ignores the weight of testimony embodied in the large number of affidavits of assessors in office in 1901, who assessed more than one-half in value of all the property in the State for 1902, as well as the depositions of six out of seven of the members of the Board of Equalization that equalized the assessments for that year. Indeed, the comparison he draws between the assessments for 1891 (made and equalized eleven years before those were for 1902) and 1902 is chiefly relied on. (R., 800-801.) In other words, he thus assumes that those for 1891 were on a 70 per cent. basis, and because those for 1902 were not as much as 30 per cent. more, he concludes there was systematic, habitual, intentional or fraudulent undervaluation in the latter year. He admits, however, that for the years 1896 and 1897, the assessments, after a full investigation and proof on both sides in *Louisville Trust Co. vs. Stone, Auditor, 105 Fed. Rep. 305*, were upheld by the court as not violative of the rights of the complainant in that case, which made the same complaint for those years as the complainant makes in this case for 1902; and states that "as to the years 1899, 1900 and 1901 there is *no* evidence directly bearing thereon, as to how, relative to value, said property was assessed, after equalization had." (R., 798-799.) Notwithstanding the *five years* immediately preceding 1902, the year in controversy, are thus excluded from consideration, he goes back still further to years prior to 1897, to institute comparisons in order to show the assessments for 1902 were made and equalized on a basis of not exceeding 80 per cent. of the fair cash value of the property assessed, in the face of all of appellants' direct and positive proof to the contrary by the assessing and equalizing officers, who acted and have testified under oath to the truth of the proposition that they endeavored to the best of their ability and according to the information and sworn testimony of witnesses produced before them, to assess and equalize all the property coming under their jurisdiction in that year at its fair cash value.

Had he taken the total value of all property in the State assessed by local assessors and equalized by the Board of Equalization, for either of the years 1897 and 1898, as representing the fair *cash* value of such property in said years, and as the basis of comparison with the same for 1902, as he should have done after the controlling decision in *Louisville Trust Company vs. Stone, Auditor, supra*, his conclusion would have been very different. Exhibit E, with the affidavit of ex-Auditor Stone, offered in evidence by appellants (R., 778-781) above referred to, shows the total equalized value of all taxable property in the State (not including property and franchises assessed by the Railroad Commission and the Board of Valuation and Assessment) for 1897, on which taxes were collected, was $549,419,980. The total of the same classes of property for 1902 (R., 465) was $598,829,633, making $49,409,653 of

an increase over the total equalized value of all such taxable property in the State within five years. Again, the total equalized value of all such property in the State for 1898, on which taxes were collected, was $552,957,768 (R., 787), which, deducted from the total equalized value of the same classes of property for 1902 (R., 465), shows an increase of $45,871,865 within four years.

In view of these material increases, as shown by the evidence in the record, amounting to, approximately, 2 per cent. per annum for the period mentioned over the fair cash value of all such property, as established and upheld by the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Louisville Trust Company vs. Stone, Auditor, supra*, for the years 1897 and 1898, it seems astonishing that the same counsel who represented the complainant in that case again come into the Circuit Court and claim in the case at bar, *without even a pleading so alleging*, that the local assessors and Board of Equalization in the State of Kentucky, by the manner in which they made and equalized assessments of the classes of property coming under their jurisdiction, habitually, systematically, intentionally or fraudulently undervalued such property for the year 1902, so as to deny to the complainant and appellee, the Louisville & Nashville Railroad Company, a single, isolated taxpayer, the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States. It appears still more incredible to counsel for appellants that such contention should have been actually sustained by the Circuit Court *upon practically the same evidence* used and offered by complainant's counsel in the case referred to (involving the assessments for the years 1897 and 1898 alone), which was withdrawn therefrom and filed as evidence (although incompetent and irrelevant) for complainant in the present case, involving the assessments for 1902, made and equalized four or five years afterward.

4. Section 4058, Kentucky Statutes, contains the schedule of property to be assessed by the county assessors, and the first eleven items thereof are as follows:

1. Amount of bonds and value thereof.
2. Amount of notes secured by mortgage.
3. Amount of other notes.
4. Amount of accounts.
5. Amount of cash on hand.
6. Amount of cash on deposit in bank.
7. Amount of cash on deposit with other corporations.
8. Amount of cash on deposit with individuals.
9. Amount of all other credits or money at interest.
10. Amount of stock in joint stock companies or associations of this State not paid on by the company or association.
11. Amount of stock in foreign corporations.

The property embraced in these eleven items is the intangible property of individuals, and corresponds with the intangible property or franchise of the appellee. (*Adams Ex. Co. vs. Ohio State Auditor, 166 U. S. 219.*) It was assessed by local assessors in 1902 at $64,412,354. None of this property is equalized; the State Board of Equalization does not pass upon the assessment of this property, and it is not affected by the action of that board. (R., 73.) There is no proof in the record that this class of property was assessed at less than its fair cash value, and as the Board of Equalization did not consider it, therefore it could not be equalized at 80 per cent. of its cash value, the basis on which appellee attempts to show that farm lands and town lots were equalized.

The lands or physical property of the railroad companies is assessed by the Railroad Commission (*Secs. 4096-4102, Kentucky Statutes*), and no complaint is made by appellee, in its bill, of the assessment of this character of property, and it must be presumed that the assessment of its lands and physical property was satisfactory, and assessed as the lands of individual taxpayers. If it be true that the lands of appellee were assessed for 1902 as the lands of individuals, and there is nothing in the record to show that the intangible property of individuals was assessed for that year otherwise than at its fair cash value, what reasonable ground of complaint has appellee, even though its intangible property was assessed at its fair cash value? Wherein does the discrimination complained of exist? Certainly there is none shown between the individual and corporate owners of intangible property.

It would seem, therefore, that as far as the intangible property of appellee and of individual taxpayers is concerned, they are upon the same level, being similarly assessed.

5. The exceptions filed by appellants to certain testimony offered in evidence, on the ground that the same was incompetent, irrelevant and hearsay, ought to have been sustained by the court below. (R., 784-785.) All of the testimony embraced in the affidavits filed by appellee in other cases prior to the institution of this action, and relating solely to assessments of property for years before 1902, to wit, 1897 and 1898, and previous years, was, in our view, clearly incompetent and irrelevant to the issues formed by the pleadings in this case.

The several voluminous exhibits filed with the deposition of Thorne are mainly mere matters of calculation, made up at the instance of appellee's counsel. (R., 140-357.) They are in the nature of an argument rather than statements of facts.

So the whole of the testimony of Albritton and the exhibit filed therewith are not pertinent to any question involved or any allegation in the bill of complaint. (R., 64-67; 380-88.) He

attempts to show that the deposits in the banks of the State were not all assessed for taxation as of September 15, 1899, 1900, and 1901, for the years 1900, 1901, and 1902, but he obtained his information as to the amount of such deposits from a bankers' directory published in Chicago, of the correctness of which he had no personal knowledge whatever, and he was, of course, unable to state whether the deposits referred to belonged to residents or non-residents, or whether they were subject to taxation. (R., 66-67.) Under the laws of the State the banks were not required to list for taxation the deposits of their customers. (*Commonwealth, by, etc., vs. Bank of Commerce, 26 Ky. Law Rep. 407, decided June 18, 1904.*)

The testimony in the depositions of ex-Auditors Norman and Stone relating to the assessments of property for years prior to 1902, as well as the action of former Boards of Equalization, and stating their opinions as to the value of real estate, was likewise incompetent and irrelevant, as was also the testimony of Harrison, based, as he admits, upon hearsay and his understanding, without any personal knowledge of his own. (R. 125.)

The affidavit of H. S. Hale was wholly immaterial. (R. 603-4.) The assessment of appellee's franchise had become final and had been apportioned by the Board of Valuation and Assessment before this action was commenced. (*Coulter's Depo., R., 76.*) While Hale states he did not, as clerk of the corporation department, begin to make up the exact amounts to be certified by the auditor to the several county clerks until the thirty days' notice of the finality of such assessment had expired, the apportionment had been made by said board before its adjournment on July 1, 1902, and there was nothing left for it to do thereafter under the provisions of the statute.

Yet, notwithstanding the said testimony offered by the appellee was neither competent nor relevant, and most of it hearsay, the learned judge of the court below not only considered it as legitimate evidence, but mainly based his opinion thereon, resulting in the decree appealed from, and overruled appellants' exceptions thereto. (R. 788.) To this ruling appellants excepted and assigned the same for error. (R. 824.)

Upon the whole evidence, competent and incompetent, on the trial of the case at bar, we confidently insist that the complainant manifestly failed to establish the allegations of the bill as amended, that either the county assessors, or Board of Equalization for the year 1902, "uniformly," or, as the court below erroneously construed that word, "systematically, habitually or intentionally," undervalued, or equalized the property of individuals and corporations, not required to report to the Board of Valuation and Assessment, on the basis of 80 per cent. of its cash value, or at any per cent. less than that value, as required by the Constitution and laws of the State of Kentucky.

V.

THE FRANCHISE OR INTANGIBLE PROPERTY OF THE COMPLAINANT WAS NOT, IN FACT, ASSESSED BY THE BOARD OF VALUATION AND ASSESSMENT AT ITS FULL CASH VALUE, OR AT A SUM IN EXCESS OF 80 PER CENT. OF SUCH VALUE FOR THE YEAR 1902.

Sections 4077 to 4081, inclusive, of the Kentucky Statutes prescribe the method of ascertaining the value of franchises, and the duty in this respect of the Board of Valuation and Assessment has been made clear by repeated decisions of the Court of Appeals of Kentucky and of this court.

In the case of *Louisville Railway Company vs. Commonwealth*, *105 Ky. 722*, the court says:

"In so far as this record shows, the board followed precisely the statute which regulates the method of ascertaining the value of franchises. They seem to have ascertained the value of the capital stock of the appellant, and from that deducted the tangible property assessed in the State, and the remainder thus found was fixed by the board as the value of the franchise subject to taxation. The board reached the conclusion that the appellant's property was of the value of $6,660,000, and as they fixed the franchise at $5,488,655, it would show that the tangible property was of the value of $1,171,345. The board seems to have determined the value of the appellant's property was equal to a sum of money which, at the rate of 6 per cent. per annum interest, would produce a sum of $400,000, *as its net income for the year preceding the assessment amounted to that sum.*" (See, also, *Commonwealth vs. Covington & Cincinnati Bridge Co., 70 S. W. 849.*)

And again, in *Henderson Bridge Co. vs. Commonwealth*, *99 Ky. 641*, the court said:

"So that the question returns, did the legislature mean by the expression 'capital stock' only the amount of money that may have been paid in by the stockholders, or did it mean to embrace and include by that term the entire property of every kind and and description, tangible and intangible, embracing not only capital stock originally paid, but all property afterwards acquired and then owned by the company, as well as any surplus, undivided profits then on hand, and all other assets, as well as the franchise?

"In the light of the foregoing provisions of the Constitution, and of the act of the legislature, and of the instructions given to the Board of Valuation and Assessment, and of the sworn statement demanded of the president of the company, on which, with other testimony, to make this valuation, we are constrained to say that by this term capital stock the legislature meant to include the entire property, real and personal, tangible and intangible, all assets on hand, and its franchise as well, and that, when so embraced and

construed and valued as an entirety, then to take off the tangible property already assessed, and that the net balance will show and shall be the value of the franchise to be taxed under Section 4077."

See, also, *Henderson Bridge Co. vs. Com., 166 U. S. 152; Adams Express Co. vs. Ky., Ib. 180; Western Union Telegraph Co. vs. Taggart, 163 U. S. 1.*

And another rule to ascertain the value of the entire property of a corporation is laid down by Mr. Justice Miller in *State Railroad Tax Cases, 92 U. S. 575*, wherein he says:

"It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises, for these are all represented by the value of its bonded debt and of the shares of its capital stock."

1. The rule for ascertaining the value of the franchise or intangible property of a railroad company and its apportionment where its lines extend into or through more than one State being clearly defined by the statutes and decisions above quoted, let us apply it to the report of the complainant made to the auditor as of September 15, 1901, which report was made for the purpose of furnishing the Board of Valuation and Assessment with the requisite information, to assess the value of its franchise or intangible property in Kentucky for 1902.

In the first place, it is disclosed by the proof in this case that this report was actually made as of June 30, 1901, and *not* as of September 15, 1901, as of which latter date it and other corporations are required by the *statute* to report, and as of which date all individual property is assessed. The number of shares of common stock in the complainant company is shown by this report to have been 550,000. The par value of this stock was $100 per share, but the report fails to give the *real* value of this stock, but discloses that the stock sold on the New York Stock Exchange during the year as low as $68¾ per share, and as high as $111¾, and that the average price was $87.08 per share; that the bonded indebtedness was $90,284 660, and that the value of all other assets, including surplus fund and undivided profits, was $8,729,560. (R., 518-19.)

These prices of its shares of stock, as shown by the report of complainant, are for the year preceding June 30, 1901, not for the year, as required by the statute, preceding September 15, 1901. (*Harrison's Depo., R. 130.*)

The assessment of complainants's franchise or intangibe property was made by a majority of the Board of Valuation and Assessment (Treasurer Hager, R., 718-19, and Secretary Hill, R., 729-30), based on the data furnished by this report, as follows (R., 489):

TABLE A.

Stock, 550,000 shares, at $87.08, the *average* salable value for the year	$47,894,000
Added to this the value of the bonds	90,284,660
Which gave a total capital of	$138,178,660
Kentucky's part of this on mileage basis	.26
Made Kentucky's share of capital	$35,926,451
Deducting from this the value of tangible property	23,013,825
Left franchise value for 1902	$12,912,626

Notice was given complainant by the board of this assessment of its franchise or intangible property, May 14, 1902 (*Exhibit No. 6 with Coulter's Depo., R., 491*) and after hearing the protest and argument of complainant's counsel and officials, this exceedingly liberal and low assessment was reduced by the board to $10,774,899, a difference of $2,137,727, or 16 per cent., and this reduced and final assessment of $10,774,899, of which it was given notice July 1, 1902 (*Exhibit No. 4 with Coulter's Depo., R., 488*), is the one to which complainant is objecting, as being the *full* or *fair* cash value of its franchise, while the property of individuals and corporations not required to report to this board is alleged to have been equalized on an 80 per cent. basis of its fair cash value by the Board of Equalization.

Right here is the weakest point in complainant's case, for though we should, for the sake of argument, admit that other property in the State was equalized at 80 per cent. of its fair cash value as alleged, yet this assessment of complainant's franchise at $10,774,899 for 1902 is not as much as 70 per cent. of its fair cash value, and we will undertake to demonstrate this fact to the satisfaction of the court.

In arriving at the valuation of the intangible property of a railroad company, the process is not as simple as it is in fixing the value of a farm or the personal property of an individual, for there are a number of elements of value to be considered in the former, requiring careful investigation. On the stock and bond plan, we have to find the value of the bonds, the shares of stock, the tangible property, the total capital, and where the railroad extends beyond the limits of the State of Kentucky as in this case, then the percentage to which the State is entitled of the capital stock on the mileage basis.

Let us now examine this first calculation, as above stated, made by the majority of the board, and which, for convenience, we have designated above as Table A. (R., 489.) In making this calculation, we find that the shares of stock are estimated at $87.08, which

was the average salable value of stock for the year preceding June 30, 1901. The statute says nothing about the *average* value of stock, yet this information was gratuitously furnished by the complainant in its report to the board. The statute does, however (Section 4078, R., 6-7), call for the *highest* price for which the stock sold at a bona fide sale within the previous twelve months, and this, as shown by the report, was $111.75. (R., 679.) Now, let us accept this as the value of the stock, and make another calculation and call it

TABLE B.

550,000 shares of stock, at $111.75	$61,462,500
Bonds at par	90,284,660
Total capital	$151,747,160
Kentucky's part on mileage basis	.26
Kentucky's share of capital	$39,454,261
Deduct tangible property	23,013,825
Leaves franchise value	$16,440,436

The assessment fixed is $10,774,899, which is only 65 per cent. of this franchise value.

But if we are mistaken in estimating the stock at $111.75, the highest price at which it sold for the previous twelve months, then let us take it at par, $100 per share, which is $3.12½ less than it sold for on the market on September 16, 1901 (the 15th being on Sunday), as shown by the affidavit of John W. Green. (R., 782.) We will call this calculation

TABLE C.

550,000 shares of stock, at $100 per share	$55,000,000
Bonds at par	90,284,660
Total capital	$145,284,660
Kentucky's per cent. on mileage basis	.26
Kentucky's part, capital stock	$37,774,011
Deducting value of tangible property	23,013,825
Leaves franchise value	$14,760,186
And the franchise value, as fixed by the board is just 70 per cent. of this fair cash value.	$10,774,899

If we deduct from the bonds in this calculation the $617,000 which, in its report, complainant claims were bonds on a tract of land in St. Louis, and should not be included in estimating its franchise, we will still have as the franchise value, $14,599,766.

AUDITOR COULTER'S CALCULATION.

It appears from the proof that Auditor Coulter, the other member of the Board of Valuation and Assessment, made a separate calculation from the majority of the board. (*Coulter's Depo., R., 79, Exhibit with same, R., 489.*) His calculation was made on the basis of the net earnings, and is as follows:

Rent	$ 125,561
Interest on bonded debt	4,276,093
Interest on floating debt	46,933
Dividends	2,695,000
Expenditures for S. & N. A. R. R.	548,590
Expenditures for improvements	179,515
Net income	1,406,597
Total	$9,278,289

Capitalizing this sum on a 6 per cent. basis gave him as the total capital of the road $154,638,150.

He then took 80 per cent. of this total capital in and out of Kentucky, amounting to $123,710,520, and ascertained Kentucky's share, or 26 per cent. thereof, to be $32,164,735. By his calculation in this way he found after deducting $23,103,825, the assessed value of appellee's tangible property, the franchise value to be $9,150,910, which is only $1,623,989 less than the majority of the board *finally* fixed, and over $5,000,000 more than complainant claims its franchise assessment should be (having paid to the State $19,081.48 as the tax it concedes it owed the State, which is the tax at the rate of 47½ cents on each $100 on only $4,017,154.66). (R., 77.)

TABLE D.

If we take this capital, as found by the Auditor (R., 79)	$154,638,150
And find Kentucky's part by taking 26 per cent.	.26
We have as Kentucky's part	$40,205,919
Deducting the value of tangible property	23,013,825
The franchise value for Kentucky is	$17,192,094
Taking 80 per cent. of this	.80
We have the franchise on an 80 per cent. basis	$13,753,675

According to this calculation, the franchise value adopted, to wit, $10,774,899, is just 63 per cent. of the full or cash value of complainant's franchise.

But we must remember, in this connection, that it is shown by the fiftieth annual report of the Board of Directors of the complainant to its stockholders (*Exhibit G. G. C. No. 15 with Coulter's Depo., R., 533*), that the net earnings of the road were $9,789,174.40, which is $510,885.40 more than Auditor Coulter found them to be, on which he made his calculation to fix the value of appellee's franchise. (R., 77.)

TABLE E.

But let us take the net earnings found by Auditor Coulter		$9,278,289
And deduct from this everything which complainant contends should be deducted in its report to the Board of Valuation and Assessment for the year 1902 (R., 520), to wit:		
Rent from real property in St. Louis	$12,380	
Dividends on stock of Kentucky corporations	15,205	
Interest on mortgage bonds on real property	30,850	58,435
It leaves		$9,219,854
Capitalize this on a 6 per cent. basis and we have as total capital		$153,664,233
Find Kentucky's part by taking 26 per cent		.26
And it gives us		$39,952,700
Deduct value of tangible property		23,013,825
And it makes the franchise value		$16,938,875
And bring this to an 80 per cent. basis, and we have		$13,551,100

The assessment made by the board, $10,774,899, is only 65 per cent. of this fair cash value ($16,938,875).

TABLE F.

If, however, we further concede to the complainant that Kentucky's proportion of the total mileage is only 24.75, as it contends, then Kentucky's part of this total capital of $153,664,233 is	$38,031,897
From this deduct tangible property	23,013,825
And we have Kentucky's share of the franchise value	$15,018,072
And reduce this to an 80 per cent. basis	.80
We have	$12,014,457

The assessment in question, as fixed by the board, $10,774,899, is only 71 per cent. of this franchise value of $15,018,072.

TABLE G.

If we take the net earnings as found by Auditor Coulter		$9,278,289
And deduct therefrom the following amounts stated in complainant's report:		
Expenditure for S. & N. A. R. R	$548,590	
Expenditures for improvements	179,515	
Rent from real property in St. Louis	12,380	
Dividends on stock of Kentucky corporations	15,205	
Interest on mortgage bonds on real property	30,850	
Profits on other roads (included in gross earnings)	27,891	814,431
And capitalize this balance of net earnings on a 6 per cent. basis		$ 8,463,858
It will give us a capital of		141,064,300
And find Kentucky's part by taking 26 per cent		.26
Will be		$36,676,718
Deduct tangible property		23,013,825
And it leaves the value of franchise in Kentucky		$13,662,893

And the franchise value found by the board, $10,774,899, is only 78 per cent. of this franchise value.

THE MILEAGE.

2. All of these calculations (except Table F) have been made on the theory that 26 per cent. was the correct proportion that the mileage of complainant's lines in Kentucky bore to the total mileage of its lines in this State and elsewhere. It appears from the depositions of Hager (R., 719-20) and Hill (R., 730-31) that this per cent. was furnished by Albritton, the corporation clerk in the auditor's office, who acted as secretary of the Board of Valuation and Assessment, and it further appears that they had not made the calculation at all, but simply accepted his as correct.

An examination of the mileage which complainant operated, owned, leased, or controlled, in and out of Kentucky, will disclose, however, that 26 per cent. is a much smaller per cent. than Kentucky is really entitled to.

Exhibit No. 2, filed with the deposition of Thomas B. Harrison, one of the attorneys for complainant, shows the same mileage as complainant's report filed with the auditor as of September 15, 1901, upon which the Board of Valuation and Assessment made its assessment, to wit: Total miles in Kentucky, 1,316.33; total miles in Kentucky and elsewhere, 5,317.76. (R., 582-85.) This would give Kentucky a percentage of only 24.75.

Section 4081, Kentucky Statutes provides:

"If the corporation organized under the laws of this State or of some other State or government be a railroad, the lines of which extend beyond the limits of this State, the said board will fix the value of the capital stock as hereinafter provided, and that proportion of the value of the capital stock which the length of the lines *operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased, or controlled* in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State."

In this Exhibit No. 2, Mr. Harrison sets out each road by name and gives its length in miles, and included in this list, there are 1,668.21 miles (of which 8.73 are in Kentucky and the remainder, 1,659.48 are out of Kentucky) which, as we contend, should not be included or considered at all, because they are not "*operated, owned, leased, or controlled*," within the meaning of the statute, by complainant. This fact is conclusively established by the fiftieth annual report of the Louisville & Nashville Railroad Company for the fiscal year ending June 30, 1901, and which report is filed as Exhibit No. 15, with the deposition of Auditor Coulter.

On page 6 of this report we find this statement (R., 531):

"Lines in which this company is interested, but operated under separate organization:

"Nashville, Chattanooga & St. Louis Railway (a majority of the capital stock owned)	941.66
"Birmingham Southern Railroad (one-half of the capital stock owned	70.48
"Central Transfer R'y & Storage Co., Louisville (one-half of the capital stock owned)	.67
"Georgia Railroad and dependencies (interested as joint lessee)	624.00
"Birmingham, Selma & New Orleans Railway (a majority of the capital stock owned)	31.40
	1,668.21"

It is shown by said Exhibit No. 2, with Mr. Harrison's deposition, that of the above mileage the Central Transfer R'y & Storage Co., .67 miles, and 8.06 miles of the Nashville, Chattanooga & St. Louis road are in Kentucky (R., 584-85), and the remainder, as above stated, 1,659.48 miles are outside of Kentucky.

The interest which complainant has in this 1,668.21 miles of road is shown to be as follows: As joint lessee with the Alantic Coast Line, in the Georgia Railroad and dependencies, 624 miles (R., 532); and as the owner of one-half, or a majority of the capital stock of the remainder, 1,044.21 miles. (R., 531.)

As to the Georgia Railroad and dependencies, this fiftieth annual report shows that it is not operated by complainant alone, but under a separate organization, and the only interest claimed is that of joint lessee. This being the case, it can not be seriously contended that complainant itself either operates, owns, leases, or controls said road, as contemplated by the statute, for, if being a joint lessee is equivalent to having a lease of the entire road within the meaning of the statute, then it would be the same whether leased by two or two hundred joint lessees, and each of the lessees (if they happened to be railroad companies having lines in Kentucky) could use this *whole* 624 miles to decrease Kentucky's percentage of its entire capital based on its total mileage.

As to the 1,044.21 miles in which complainant simply owns one-half or a majority of the stock, it does not claim, of course, to own, lease, or operate the roads, but claims that by virtue of owning this one-half or a majority of the shares of stock, it *controls* the road within the meaning of the statute. Of course, the ownership of only *one-half* of the shares of stock of another company doesn't carry with it any control of the road in any sense. It will be observed that the statute refers to the *lines* or *roads* controlled, not the corporation or company, and while the ownership of a *majority* of the shares of stock in a railroad company may give practical control of the company in the way of electing its officers, etc., and even of dictating its policies to the extent of preventing competition between two parallel roads where one company acquires the majority of the stock of both roads, as determined in the *Northern Securities Company Case*, *120 Fed. Rep. 721*, this, however, is not the "control" of the road contemplated by the Kentucky statute. The true construction of this portion of the statute has never been announced in any decision of the Kentucky Court of Appeals, as shown by the testimony of one of appellee's attorneys. (*Harrison's Depo., R., 140.*)

The authorities on this point are abundant, however, and sustain our contention fully. The case of *Pullman's Palace Car Co. vs. Missouri Pacific Railway Company*, *115 U. S. 587*, is directly in point. There the railway company had contracted with the Pullman Company to use the latter's cars on "its own line of road and all roads which it now *controls*, or may hereafter *control*, by ownership, lease or otherwise," and subsequently the Missouri Pacific Railway Company acquired all but 1,795 of the 220,682 shares of the capital stock of the St. Louis, Iron Mountain & Southern Company (being 99 per cent.), and the two roads were operated by the same general management; five of the directors of the Missouri Pacific being also directors in the St. Louis, Iron Mountain & Southern Company. The general offices of the two companies were kept together, and both roads managed substantially by the same persons, and yet the court held in that case that this was not a *control* of the *road*.

The court, through Chief Justice Waite, said:

"We are also of opinion that the railroad of the St. Louis, Iron Mountain & Southern Company is not *controlled* by the present Missouri Pacific Company in such a way as to require that company to haul the Pullman cars over it, if the contract is binding on the new company to the same extent it would be on the old, were the company still in existence and standing in the place of the new. Confessedly, the St. Louis, Iron Mountain & Southern Company keeps up its own corporate organization. It operates its own road. It has its own officers and makes its own bargains. The Missouri Pacific owns all, or nearly all, its stock, and in that way can determine who shall constitute its board of directors; but there the power of that company over the management stops. The board, when elected, has controlling authority, and for its doings is not necessarily answerable to the Missouri Pacific Company. The two roads are substantially owned by the same persons and operated in the same interest, but that of the St. Louis, Iron Mountain & Southern Company is in *no legal sense* controlled by the Missouri Pacific. * * * The Missouri Pacific Company has bought the stock of the St. Louis, Iron Mountain & Southern Company, and has effected a satisfactory election of directors, but this is all. It has all the advantages of a control of the road, but that is not in law the control itself. *Practically it may control the company, but the company alone controls its road.* In a sense, the stockholders of a corporation own its property, but they are not the managers of its business or in the immediate control of its affairs. Ordinarily, they elect the governing body of the corporation, and that body controls its property. Such is the case here. The Missouri Pacific Company owns enough of the stock of the St. Louis, Iron Mountain & Southern to control the election of directors, and this it has done. The directors now control the road through their own agents and executive officers, and these agents and officers are in no way under the direction of the Missouri Pacific Company. If they or the directors act contrary to the wishes of the Missouri Pacific Company, that company has no power to prevent it, except by the election, at the proper time and in the proper way, of other directors, or by some judicial proceeding for the protection of its interest as a stockholder. Its rights and its powers are those of a stockholder only. It is not the corporation, in the sense of that term as applied to the management of the corporate business or the control of the corporate property."

The doctrine announced in this decision has been cited and approved in *Porter vs. Pittsburgh, etc., Co., 120 U. S. 670*, holding the fact of owning a majority of the stock does not give *legal control* of the corporation; *American Preservers Co. vs. Norris, 43 Fed. 714*, holding the agreement of a majority of the stockholders with strangers does not bind the corporation; *Exchange Bank vs. Macon, etc., Co., 97 Ga. 7, 33 L. R. A. 803*, holding ownership of

the *entire* stock of another corporation does not vest title to property in the latter; *Atchison, etc., R'y vs. Cochran, 43 Kan. 234, 19 Am. St. Rep. 131, 7 L. R. A. 418*, holding one railroad is not liable for the negligence of another the stock of which it holds.

It is admitted that the N., C. & St. L. R'y is managed and operated by a separate and distinct board of directors from that of the complainant, and that the latter company has no control over the former other than that which grows out of the fact that it owns a majority of the shares of capital stock therein. (*Harrison's Depo., R., 132.*)

In *Louisville Gas Co. vs. Kaufman, Straus & Co., 105 Ky. 131*, it was held that the ownership by one corporation of the entire capital stock of another does not operate to make the two companies one or the first named liable for the negligent acts of the other, the latter maintaining its corporate existence.

The members of the Board of Valuation and Assessment all testify in substance they would have enlarged Kentucky's share of the assessment of complainant's franchise for 1902 had they known the facts as to the complainant's alleged "control" of the N., C. & St. L. Railway, and alleged "lease" of the Georgia Railroad. (*Coulter's Depo., R. 84, 98, 99; Hager's Depo., R., 720; Hill's Depo., R., 731.*)

Although the net earnings of the former company for 1902 amounted to $1,051,625 (*Coulter's Depo.*, R., 87), not one cent of the same was embraced in the reported gross or net earnings of complainant, no dividend having been declared by that company for that year. (*Auditor's jacket of N., C. & St. L. Ry. for 1902. Exhibit No. 14 with Coulter's Depo., R., 525; Thomas B. Harrison's Depo., R., 126-7.*)

In the light of this reasoning and these authorities, we submit in all confidence that there should be eliminated from the mileage claimed by complainant this 1,668.21 miles, of which 8.73 miles are in Kentucky, and should be deducted from Kentucky's mileage, and the remainder, 1,659.48 miles, are outside of Kentucky, and should be deducted from the total mileage, and which would leave the mileage in Kentucky 1,307.60, and the total mileage in and out of Kentucky, 3,658.28, which would give Kentucky a percentage of 35.7, instead of 26, as used by the Board of Valuation and Assessment in its calculations.

If, however, we should be mistaken in this conclusion, and the court should determine to allow complainant its proportion of the Georgia Railroad, to wit: one-half, or 312 miles, then we would have the mileage in Kentucky 1,307.60 and the total mileage 3,970.28, which would make Kentucky's percentage 32.9; or, if the entire mileage of the Georgia Railroad (624) were given to complainant, we would then have in Kentucky 1,307.60 miles, and the total mileage 4,282, Kentucky's percentage being 30.5. If we go still further and allow complainant the *proportionate* part of every road claimed, Kentucky's percentage of mileage would

be 28.63; that is, allowing complainant the same percentage of the mileage of each road that it has in its share of stock, which would give it 60.32 per cent. of the Nashville, Chattanooga & St. Louis Railway, 941.66 miles (933.60 miles being out of Kentucky and 8.06 in Kentucky), and taking the same per cent. of the Birmingham, Selma & New Orleans Railway, 31.40 miles, and 50 per cent. of the Birmingham Southern Railroad, 70.48 miles; Central Transfer Railway & Storage Co., Louisville, .67 miles, and Georgia Railroad, 624 miles (joint lessee). (R., 118.) This would give complainant in Kentucky 1,312.79 miles, and total miles 4,584.12, Kentucky's percentage of the whole mileage being 28.63.

Let us now take 35.7 per cent. as the mileage basis to which Kentucky is entitled of complainant's capital, and apply it to Table A, instead of 26 per cent. as used by the board, and we have, total capital	$138,178,660
Kentucky's percentage on mileage basis	35.7
Kentucky's share of capital	$49,329,781
Deducting tangible property	23,013,825
Franchise value	$26,315,956

And the assessment, as fixed by the board, $10,774,899, is just 40 per cent. of this value.

If we use the 32.9 per cent. as Kentucky's part in this Table A, instead of 26 per cent., we have a franchise value $22,446,954; or, if we take the 30.5 per cent. as Kentucky's per cent., we have $19,130,666 as the value of the franchise, and if we take 28.63 as Kentucky's per cent., it gives us $16,556,396 as the value of the complainant's franchise, and, of course, applying these percentages to the other tables, the franchise values would be correspondingly higher. The assessment as fixed by the board, $10,774,899 is 65 per cent. of this $16,556,397, the lowest franchise value found as above. And in this Table A it will be remembered that the stock was estimated at its *average* salable value, to wit: $87.08 per share.

If we take 28.63 as Kentucky's per cent. of mileage and apply it instead of 26 per cent. to Table G, the franchise value would be $17,382,758, and the franchise assessment fixed by the board would be 62 per cent. of this cash value. If we take 30.5 as Kentucky's per cent., then the franchise value would be $20,010,786, and the assessment as fixed by the board would be 53 per cent. of this value. If we take 32.9 as Kentucky's per cent., then the franchise would be $23,396,329, and the assessment fixed by the board would be 46 per cent. of this cash value. If we take 35.7 as Kentucky's per cent., then the franchise would be $27,346,130, and the assessment as fixed by the board would be 39 per cent. of this value.

It is important here to note that the testimony of Auditor Coulter discloses the fact that the complainant for the year 1902, under the

revenue laws, as erroneously construed and executed by the auditor, pays on its franchise assessment a rate of only 47½ cents on the $100, while individuals and corporations not reporting to the Board of Valuation and Assessment pay for the same year a rate of 50 cents on the $100. (R., 79-81.) This reduction of 2½ cents on the *rate* is equivalent to a reduction of 5 per cent., or one-twentieth, of appellee's *assessment*, and in estimating the per cent. which the assessment, as fixed by the board, is of the fair cash value under each table, there should be deducted this 5 per cent. In other words, the auditor has thus given the appellee a reduction on its franchise denied to all other classes of property, so that if assessed thereon at full value, it pays on only 95 per cent., or, if at only 80 per cent. it pays on only 75 per cent. of its value. This reduction of 2½ cents on the $100 amounts to $2,693.69 on $10,774,899.50, the assessed value of appellee's franchise for 1902.

The Constitution of Kentucky, Sec. 174, provides that "all *corporate* property shall pay the same rate of taxation paid by *individual* property."

The assessment of the railroad companies for all of the years prior to 1901 were compromise assessments at not more than 50 per cent. of the real value, and often less.

(*Deposition of Long, R., 734-737; Exhibit S. H. S. No. 1, filed with Deposition of S. H. Stone, R., 556-559-560, 566-567.*)

This Exhibit No. 1, with Stone's deposition, is a copy of a deposition in another case, where the complainant was one of the plaintiffs who took said deposition, and by agreement it is to be read as though testified to in this action. (*Stone's Depo., R., 110-111.*)

The assessment of appellee's franchise, as shown by this deposition of S. H. Stone, who was at the time auditor and ex-officio chairman of the Board of Valuation and Assessment for each of the years named, 1896 to 1900, was considerably less than 50 per cent. of the real or cash value, and that the board made three separate assessments for some of the years (R., 559-565), to wit:

L. & N. FRANCHISE ASSESSMENTS, 1896 TO 1900.

Year.		Total Capital.	Tangible Property.	Franchise.
1896	1	$41,992,400	$20,662,069	$21,330,331
	2	33,921,600	20,662,069	13,259,531
	3	25,837,297	20,662,069	5,175,228
1897	1	$41,428,800	$20,015,908	$21,412,892
	2	36,049,000	20,015,908	16,033,092
	3	25,191,136	20,015,908	5,175,228
1898	1	$32,899,200	$19,799,068	$13,100,132
	2	24,974,296	19,799,068	5,175,228
1899	1	$24,675,248	$19,500,020	$5,175,228
1900	1	$24,675,248	$19,566,665	$5,108,588

It is a rather remarkable coincidence that the assessment of this road for each of the first four years was the same, and it shows conclusively that it was an arbitrary, or compromise, assessment.

For 1900, under a new board, the same capital stock as the previous year was adopted, but, the tangible property being larger, the franchise was slightly smaller. All of these assessments, Auditor Stone, in Exhibit S. H. S. No. 1 (R., 556), tells us, were simply compromise and arbitrary assessments to establish the precedent of taxing this species of property without long litigation, and the four years' assessments made by Auditor Stone's board amount to *less* than the first assessment made for the year 1896, to wit, $21,330,331, and yet complainant claims it has been discriminated against and has not received the equal protection of the laws. This injunction, it seems, was sought by the wrong party; the individuals and corporations not reporting to the Board of Valuation and Assessment should have sought an injunction, and could have done so with infinitely more reason, and compelled a material increase of complainant's assessment. In instituting these proceedings, complainant neglected to heed the scriptural injunction of first casting the beam out of its own eye before it undertook to cast the mote out of its brother's eye.

The fact that the franchises of the railroad companies prior to 1902 were not assessed at their cash or full value was declared in the case (to which the appellee, Louisville & Nashville Railroad Company, was a party appellant) of *Southern Railway in Kentucky, etc., vs. Coulter, Auditor, etc., 113 Ky. 657*, where the court said (*Ib. 679*):

"The record shows that the old board fixed a *low* valuation on the franchise in question."

The same rule applying to the appellee applies to each of the other railroads; all of them that were assessed at all for a franchise tax (a great many escaping entirely) were assessed on a compromise basis of less than 50 per cent. (R., 566.)

These facts and figures fully explain the increase of the assessment for 1902 over that of previous years, and also show that the 1902 assessment is not up to 80 per cent. of the cash value. The proof in this case also shows that the property of complainant has increased considerably in value, its stock selling higher during the two years prior to the institution of this action than ever before in its history.

We are at a loss to comprehend under what rule of justice or equity appellee's assessment can be reduced to $4,017,154.66, the amount claimed in its bill and decreed by the learned circuit judge. This amount is less by over $1,000,000 than its assessment for each of the years 1896 to 1900, which assessments, as appear from the record, were merely compromises made by the Board of Valuation and Assessment to establish the principle of

taxing the franchises of railroad companies (R., 735-6-10, 556-560-2), and, furthermore, these assessments were made when the property of appellee was not as valuable as it was on September 15, 1901, as is clearly shown by the market value of its stocks, and by its income for these respective years.

3. Complainant's counsel, in our opinion, seek to have an erroneous construction placed upon the language of Section 4081, Kentucky Statutes. The court's careful examination of said section is invited. It will be seen, when the Board of Valuation and Assessment has ascertained the value of the capital stock or entire property of a railroad corporation, that proportion of the same "which the length of the lines *operated, owned, leased or controlled in this State* bears to the total length of the lines *owned, leased or controlled in this State and elsewhere*, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State." The word "operated" is not used in the second clause, when speaking of the total lines in this State and elsewhere. We contend that the words "operated" and "controlled" in the first clause of said section, in speaking of the lines in this State alone, are used interchangeably, or as synonyms. Therefore, in the second clause, where the total lines in the State and elsewhere are referred to, the word "operated" is eliminated and its synonym, "controlled," alone is used. In other words, the lines both in and out of this State to be considered by said board are those *owned*, *leased*, or *operated* by the railroad company whose franchise is sought to be assessed. The relation of "operator" of the road is of first importance, and is first mentioned. Indeed, in the latter part of the section the word "operated" alone is used, when direction is given as to how the franchise assessment shall be apportioned between the counties, cities, towns and districts. Such apportionment is required to be made in the proportion the length of the lines *operated* in each of said subordinate divisions bears to the whole length of the lines in the State. Mere technical control of the election of directors in another company by reason of the ownership of a majority of the shares of stock in such company, was never contemplated by the legislature in the passage of this act.

To illustrate the unsoundness of the contention of appellee's counsel on this point, let us suppose that the whole of the line of the N., C. & St. L. Railway, to wit, 941.60 miles, instead of only 8.06 miles thereof, was in Kentucky, would counsel for appellee insist that the Louisville & Nashville Railroad Company, by reason of its being a majority stockholder, should include this additional mileage in Kentucky in its total mileage, as well as in its mileage in that State, as the basis of ascertaining Kentucky's share of the assessment of appellee's franchise? We hardly think so. If this mileage of the N., C. & St. L. Railway out of the State (933.60) were in Kentucky, and added to the total mileage of appellee and

to that in Kentucky, that State's share of the entire franchise assessment would be in the proportion which 2,249.93 miles bear to 5,317.76 miles, or over 42 per cent., instead of only 26 per cent.

Furthermore, in the case supposed, both the N., C. & St. L. Railway and the Louisville & Nashville Railroad Company would be required to pay a franchise tax to Kentucky, based on the same total mileage in that State, the former as the "owner and operator," and the latter as the alleged "controller," thus imposing double taxation.

As the statute has been administered, the N., C. & St. L. Railway, as the "owner and operator," has been properly assessed for a franchise in Kentucky. Its report, as of September 15, 1901, was filed for 1902. (*Exhibit No. 14 with Auditor Coulter's Depo., R., 523-30.*) From that report its net earnings were ascertained to be $1,051,625, which, being capitalized on a 6 per cent. basis, gave a total value of $17,527,083, of which Kentucky's share, based on 57.63 miles in that State out of a total mileage of 1,195.86 miles in Kentucky and elsewhere, was $1,402,166, which mileage is included in the line leased by the N., C. & St. L. Railway from the Paducah & Memphis division of the appellee, of which 204.97 miles were out of, and 49.23 miles in Kentucky. This was the preliminary assessment, which the board, on final action, reduced to $841,299, from which $592,900, the value of its tangible property in Kentucky, was deducted, leaving that State's share of the franchise at $248,399. (*Coulter's Depo., R., 87.*)

It is true, appellee, as the supposed "controller," in its report as of September 15, 1901, for 1902, included as a part of its own mileage in Kentucky this 8.06 miles of the line of the N., C. & St. L. Railway in Kentucky, but we contend it was not required by law to do so. It neither "operated, controlled, leased, or owned" the same, within the meaning of the statute, but this 8.06 miles of road in Kentucky was both *owned* and *operated* by the N., C. & St. L. Railway, which paid to the State of Kentucky a franchise tax based thereon, as above stated.

The fact that a part of the surplus funds or net earnings of the complainant company is *invested* in a majority of the shares of stock in another railroad company does not entitle the complainant to use the mileage of such company as part of its own mileage in computing its total mileage in this State and elsewhere. They might just as well be invested in bank stock or the shares of stock in any other corporation. Nor was such a theory ever advanced by complainant's representatives until December 10, 1900, when it appeared in an amended report to the auditor, verified by Charles Haydon, as assistant comptroller. (*Exhibit No. 17 with Coulter's deposition, R., 542-45.*) Prior to that time the complainant for the years 1893-4-5-6-7-8-9 and 1900 had uniformly reported to the Board of Valuation and Assessment the same mileage in this State,

and in this State and elsewhere, as it had in its reports to the Railroad Commission as of July 1 in each of said years, under Section 4096, Kentucky Statutes. In these reports under the latter section, the mileage, which the railroad company reporting "owns or operates" in and outside of this State, is required to be furnished. The mileage complainant owned or operated in and outside of this State, as set forth in these reports, Auditor Coulter states, was as follows (R., 82-83):

Year.	Mileage in Kentucky.	Total Mileage.
1893	811.62	3,152.48
1894	1,214.94	3,170.24
1895	1,214.94	3,178.33
1896	1,215.79	3,193.07
1897	1,220.94	3,200.66
1898	1,194.22	3,173.94
1899	1,197.46	3,204.86
1900	1,197.02	3,262.78
1901	1,194.04	3,346.45

The proportion of the rolling stock of the complainant company subject to taxation in this State was ascertained for the years mentioned, by the Railroad Commission, on the basis given above. It is hardly probable that the legislature intended to establish a different basis for ascertaining Kentucky's share of the assessment of complainant's franchise by the Board of Valuation and Assessment for the same years. While reports were regularly made to the auditor every year after November 11, 1892, by complainant, for the use of the last mentioned board, no assessment of its franchise was ever made by said board until 1899, nor was it then settled that such power existed in said board, or that any State or local taxes could be collected thereon. But later, the complainant and other railroad companies that had been retrospectively assessed were compelled to pay their franchise taxes to the State for the years 1896 to 1900, inclusive. In 1900 it became to the interest of complainant to swell its mileage outside of this State as much as possible, and for the first time it lugged into its reports the mileage of other railroad companies, in which it owned a majority of the shares of stock, and of the Georgia Railroad leased jointly to appellee and the Atlantic Coast Line. (*See amended report of December 10, 1900, R., 544-45.*)

The forty-ninth and fiftieth annual reports of complainant to its stockholders as of June 30, 1900, and June 30, 1901, respectively, show the total average mileage operated in the former year was 3,007.35 miles (R., 540), and in the latter year the total average mileage operated was 3,168.27 miles. (R., 533.)

Payment of franchise taxes by railroad companies to the counties, cities, towns, and taxing districts was resisted in the

courts, and it was not until June 10, 1902, that the Court of Appeals of Kentucky decided the controversy. (*Southern R'y in Ky. et al., vs. Coulter, Auditor, et al., 113 Ky. 657.*) Of course, the apprehension that liability for local taxes on the assessment of its franchise made it greatly more to the interest of complainant to report the largest possible mileage outside of Kentucky, although by the construction its representatives sought to have placed upon the statute would result in a small increase of the mileage in this State as reported. This it could well afford if successful in having its construction of the statute followed as to its alleged mileage outside of that State.

The Court of Appeals in the recent case of *Commonwealth vs. Covington & Cincinnati Bridge Co., 70 S. W. 849*, has laid down the rule which should govern the Board of Valuation and Assessment in ascertaining the value of the franchise of said bridge company, whose bridge is located partly in this State and partly in the State of Ohio. Kentucky's share, according to the length of the bridge, being 59 per cent., and Ohio's 41 per cent., the court held that after said board had ascertained the value of the capital stock or entire property of the company it should take 59 per cent. thereof for Kentucky's share, and deduct therefrom the assessed value of said company's tangible property in Kentucky, and the remainder would be the value of said company's franchise or intangible property subject to taxation in this State. In the calculation made by Auditor Coulter, as one of the members of said board, to ascertain the value of complainant's franchise in Kentucky, after capitalizing the net earnings on a 6 per cent. basis, making $154,638,150, he took 80 per cent. thereof, or $123,710,520, in carrying out his theory of making such assessment uniform with the assessment of other property in that State, thereby scaling or discounting the value of complainant's entire property *in and out* of that State 20 per cent. Then he took 26 per cent. of the latter sum, making Kentucky's share thereof only $32,164,735. (*Exhibit No. 5 with Coulter's Depo., R., 489.*) Deducting the assessed value of the tangible property of complainant in this State, $23,013,825, from the latter sum, there was left a franchise value of only $9,151,110 in Kentucky. This, however, is over $5,000,000 more than the value claimed by appellee, and fixed by the decree appealed from. Now, it must be apparent that, even if his theory of deducting 20 per cent. was correct, he should not have deducted, as he did, such per cent. from the value of complainant's entire property in and out of Kentucky, or from $23,013,825, the assessed value of complainant's tangible property in that State. The latter property, it must be assumed, was assessed on the proper basis and without discrimination. There is neither allegation nor proof in this case that it was otherwise assessed by the Railroad Commission. Now, if we follow the method laid down by the Court of Appeals of the State in the case last cited, and treat the tangible property of complain-

ant as having been fairly and lawfully assessed by the Railroad Commission, quite a different result will be reached, even after giving complainant the benefit of the deduction of 20 per cent. as claimed. The value of complainant's total property, according to Coulter's said calculation, is $154,638,150, and 26 per cent. of that sum yields for Kentucky's share $40,205,919. Deducting from the latter sum $23,013,825, the assessed value of complainant's tangible property in this State, there remains a franchise value of $17,192,094; and if we deduct therefrom 20 per cent. in order to place this franchise value on an 80 per cent. basis, as it is claimed other property has been by the action of the county assessors and Board of Equalization, there is still left a franchise assessment of $13,753,676, or $2,978,777 in excess of the actual assessment, $10,774,899, finally made by a majority of said board and sought to be enjoined herein.

Again, taking the preliminary assessment made by Hager and Hill, a majority of said board (*Exhibit No. 5 with Coulter's Depo., R., 489; Hager's Depo., R., 718*), based on the value of complainant's funded debt and shares of stock (the latter being placed at only $87.08 per share), or $138,178,660, we find that Kentucky's share at 26 per cent. is $35,926,451. Deducting from the latter sum the assessed value of complainant's tangible property in this State, $23,013,825, there is left a franchise value of $12,912,626. If we take 20 per cent. of this latter sum, or $2,582,525, therefrom, there is still left a franchise value of $10,330,101, or only $444,798 less than the final assessment of complainant's franchise by said board. In other words, when the majority of said board, at complainant's instance and request, scaled or discounted the tentative assessment of $12,912,626 to the extent of $2,137,727, complainant was thereby granted *substantially* all that it is asking a court of equity to grant it herein, and the assessment of its franchise was placed practically on an 80 per cent. basis, and that, too, after giving Kentucky only 26 per cent. of the total value, when, as we have seen, it was entitled to a much larger percentage thereof. (R., 490.)

In the deposition of Secretary of State Hill occurs this question, and answer (R., 731-32):

"*Q.* In making this final assessment of the franchise of the Louisville & Nashville Railroad Company, was it your object to claim every cent possible, or to be liberal and moderate in fixing the franchise under all the circumstances?

"*A.* I tried to be as liberal as my conscience would permit me, *and I thought it was fixed lower than it ought to be, and think so yet.*"

This record shows all the other railroad companies, whose franchises have been assessed for taxation, have paid the full amount of their State taxes thereon for 1902. (*Coulter's Depo., R., 99.*) None of them has complained of the assessment of its franchise

for the year 1902. Furthermore, it appears that neither the complainant nor any other railroad company having lines in this State has been assessed or paid any taxes on its franchise for either of the years 1893, 1894, 1895. (*R.*, *87.*) It would seem, therefore, if the complainant's franchise has been assessed higher than it should have been, it is a sporadic case which does not justify the intervention of the court by injunction.

VI.

THE COMPLAINANT, BY REASON OF THE ACTION OF THE COUNTY ASSESSORS AND BOARD OF EQUALIZATION, OR THE BOARD OF VALUATION AND ASSESSMENT, HAS NOT BEEN DISCRIMINATED AGAINST OR DENIED THE EQUAL PROTECTION OF THE LAWS, WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In view of the foregoing discussion of the evidence offered by the parties, in the light of the decisions already cited, we shall not elaborate this branch of our brief, but merely call the court's attention to some additional authorities.

In *King vs. Mullins*, *171 U. S.*, *436*, this court said:

"The judiciary should be very reluctant to interfere with the taxing systems of a State, and should never do so unless that which the State attempts to do is in palpable violation of the constitutional rights of the owners of property. Under this view of our duty we are unwilling to hold that the provision referred to is repugnant to the clause of the Fourteenth Amendment forbidding the denial of the equal protection of the laws."

In a recent work, *Judson on Taxation*, *Section 437*, *p. 562*, the author states:

"It is not, however, necessary to uniformity and equality in this fundamental sense that all the subjects of taxation in the State should be taxed in the same manner or by the same system of assessment. This would obviously be impossible, as the taxing power extends not only to property, but to occupations and persons within the State's jurisdiction, and the same rule of assessment could not be applied to these different classes of subjects. Even as to property taxation alone, the complicated conditions of modern industrial civilization and the mobility of many forms of personal property which effectually elude the taxgatherer, require special adjustment of taxing systems to insure even an approximation to equality in the distribution of public burdens."

In the *Head Money Cases*, *112 U. S. 595*, Mr. Justice Miller said:

"Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream."

As illustrating the difficulty always and everywhere encountered in obtaining a fair assessment of intangible property, we quote from Judge Brawley's opinion in *National Bank vs. Baltimore, 100 Fed. Rep. 27-28*, as follows:

"The taxation of personal property has always and everywhere been a vexatious problem. Horses and cattle, wagons and carriages, the implements of husbandry and household furniture—all things, in fact, which are visible, and can not readily be concealed, including therein shares in incorporated companies, which may be compelled by the law creating them to make returns—are within comparatively easy reach of the tax assessors. But the great mass of personal property, in which the wealth of a country is invested, consisting of bonds and other evidences of credit, which can be readily hidden, escape the eye of the assessor, and nothing is more conclusively settled by human experience than that it is impossible to collect taxes upon this kind of property with any reasonable approach to accuracy or equality; and this is not for want of long-sustained effort to accomplish it. There is a monotonous uniformity in the reports of the failures of every system attempted, however stringent may be the legislation, or however arbitrary or despotic may be the powers with which the assessors may be clothed. The heavy hand of the taxgatherer always falls upon the widow and the orphan, upon trustees and guardians, whose estates are required by law to be revealed to the courts of probate, and upon those only whose consciences are usually scrupulous, and who, having least experience in business, are least able to bear the burden, while the most inadequate returns are invariably made by the rich, who are usually most ingenious in evasion, and most fertile in expedients to escape taxation. The result is that always and everywhere no appreciable part of such intangible property is reached by laws, however ingeniously framed or severely enforced."

The judgment of the court below dismissing the bill of the complainant in that case was affirmed.

In *Bell's Gap R. Co. vs. Pennsylvania, 134 U. S. 233*, this court said:

"We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the States to adopt an *iron rule of equal taxation*. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require."

In *Merchants & Manufacturers Bank vs. Pennsylvania, 167 U. S. 464*, this court quoted with approval the language of the Supreme Court of Pennsylvania, in the case under review on writ of error, as follows:

"The argument is that inequality of burden establishes the unconstitutionality of the law under which the tax is levied. If the validity of our tax laws depends upon their ability to stand successfully this test, there are none of them, then, that can stand."

Again, in *Columbus Southern R. Co. vs. Wright, 151 U. S. 478*, in holding there was no violation of the Federal Constitution by a statute of the State of Georgia providing a system of taxing the rolling stock and other unlocated personal property of railroad companies, this court said:

"This is hardly an open question. Various modes of taxing railroad property are adopted by the different States. In some, railroad companies are taxed upon their property as a unit. In others, the road and the property in each county are separately assessed, and in still others, the whole road is assessed, and then the assessment apportioned among the several counties and towns. These and all similar modes of taxation are subject to the legislative discretion of the respective States, and do not ordinarily present any Federal question whatever. But the mode of distribution of the unlocated or transitory personal property is a matter of regulation by the State legislature, which in no way involves a violation of the Fourteenth Amendment."

In *Florida Central & P. R. Co. vs. Reynolds, 183 U. S. 476*, this court said:

"Now, considering the great diversity in these systems, it would obviously have worked a marked revolution if the first section of the Fourteenth Amendment had been construed as compelling a *cast-iron rule of equal taxation*. It was not intended, as held in the case quoted from, and also in *Barbier vs. Connelly, 113 U. S. 27*, to restrain the legislature from any proper and legitimate classification, both as respects property for taxation and the methods of assessment and taxation."

In that case it was held that railroad companies are not denied the equal protection of the laws by a statute of the State of Florida enacted in 1885, requiring the comptroller to assess the taxes for 1879, 1880 and 1881 upon such railroad property as had escaped taxation for such years, without providing for the assessment of taxes for those years on other property not previously assessed therefor, general legislation having provided that railroad property should be assessed by the comptroller and real estate by the county treasurer.

So, in *Kentucky Railroad Cases, 115 U. S. 321*, in holding there was no denial of the equal protection of the laws by the statute providing for the assessment of the tangible property of railroad companies in Kentucky by the railroad commission, the court said:

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descrip-

tions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose."

In South Carolina the Constitution and statutes of the State provided, as in Kentucky, that taxation of property should be equal and uniform and in proportion to its value, but it was held in *Charlotte, C. & A. R. Co. vs. Gibbes, 142 U. S. 386*, that a statute which provided that "the entire expenses of the Railroad Commission, including all salaries and expenses of every kind, shall be borne by the several corporations owning or operating railroads within this State according to the gross income proportioned to the number of miles in the State, to be proportioned by the comptroller general of the State," was not in violation of the Fourteenth Amendment guaranteeing the equal protection of the laws. The complaining railroad company, in addition to its other taxes, was assessed with $987.75 as its proportionate share of said expenses, but, in passing upon the Federal question raised, this court, in an opinion by Mr. Justice Field, said:

"All railroad corporations in the State are treated alike in this respect. The necessity of supervision extends to them all, and for that supervision the like proportional charge is made against all. There is no occasion for similar regulations for the government of other than railroad corporations, and therefore no charge is made against them for the expenses and salaries of the commissioners. The rule of equality is not invaded where all corporations of the same kind are subjected to like charges for similar services, though no charge at all is made against other corporations. There is no charge where there is no service rendered. The legislative and constitutional provision of the State that taxation of property shall be equal and uniform, and in proportion to its value, is not violated by exacting a contribution according to their gross income in proportion to the number of miles of railroad operated in the State to meet the special service required. *Barbier vs. Connelly, 113 U. S. 27; Soon Hing vs. Crowley, 113 U. S. 703; Missouri Pacific R. Co. vs. Humes, 115 U. S. 512.*"

The great weight of authority in the State courts is against the doctrine that a taxpayer may have an injunction where his

property has been assessed *relatively* more than similar property owned by others. (*Wagoner vs. Loomis, 37 Ohio St. 571; Lowell vs. County Commissioners, 152 Mass. 375; Central Railroad Co. vs. Assessors, 48 N. J. L. 1; Louisville Railway Co. vs. Commonwealth, 105 Ky. 710.*)

In the case of *Louisville Railway Co. vs. Commonwealth, supra*, the collection of State taxes on the assessments of the franchise of a street railway company by the Board of Valuation and Assessment was resisted on the ground, among others, that other assessing officers, including the Board of Equalization, had adopted a rule to assess and equalize all assessments of tangible property in the State, for such taxes, on the basis of 70 per cent. of its value, the result of which was alleged to be a denial to such street railway company of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. In response to this contention Judge Paynter, in delivering the opinion of the court, said (*Ib.* 718):

"The contention of counsel for appellant is to the effect that, if other officers of the State disregard the constitutional provision and the statutes requiring them to assess property at its fair cash value, the courts should adjudge that the action of the Board of Valuation and Assessment in assessing franchises at their fair cash value, estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded, although they may have acted in strict conformity to the law imposing the duty.

"The officers take an oath that they will faithfully discharge their duties, and if they have due respect for their oaths, they are bound to follow the requirements of the organic and statutory law of the State. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the Constitution except officers be selected by the people for the purpose of assessing the property, that revenue may be raised to carry on the government. It does not seem to be logical or sound in principle to say that, because one officer or a class of officers disregard the law, the action of those who strictly follow it, for that reason, should be annulled. If that be a proper view, then the constitutional provision and the statutes become a dead letter, and the courts will be continually called upon to disregard the legal action of legally constituted officers because other officers in the State have acted illegally.

"The court is called upon to constitute itself an instrument, not to uphold the Constitution, but to make complete the utter disregard of its provisions by not sustaining a proper and legal action of the officers of the State in the performance of their duties. If the officers of the State are not properly assessing the

real and personal property of the several counties of the State, and if the railroad commissioners of the State are not faithful in the discharge of their duties in assessing the railroad property of the State, then there must be a change of the personnel in the various offices of the State so as to bring about a condition, in so far as possible, that equality of assessment and taxation can be had. A speedier way would be to enforce the penal and criminal statutes of the State if they are being violated. If they are, the prosecution of an officer would suffice to correct the evil complained of. It may be said that this will take time and cause some of the taxpayers of the State to bear an unequal proportion of the burdens of taxation. It is far better that this should be done for a short time rather than for the courts to adjudge illegal that which the organic law of the State declares is legal. We can not give our consent to declare void a proceeding because such proceeding conforms to the law.

"Substantially the same question involved in this case was under consideration in the case of *City of Lowell vs. County Commissioners of Middlesex, 152 Mass. 375*. The court said: 'It is a violation of the statutes knowingly to make a valuation of property for the purpose of taxation at less or more than its full and fair cash value. The just proportion intended by the existing statutes is attained by assessing the property of different persons at a uniform rate upon its fair cash valuation. Whatever may be the remedy, if there be any, when it is shown that the assessors have intentionally assessed the property of a part, or all, of the inhabitants at less than its fair cash value, we are of the opinion that, in a petition for the abatement of taxes on the ground of the overvaluation of the property of the petitioner, and the disproportionate taxation arising from such overvaluation, the question is, whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons.'

"In New Jersey the question arose under laws somewhat similar to the laws of Kentucky, and the court, in *Central Railroad Company vs. State Board of Assessors, 48 N. J. L. 7*, said: 'The establishment of this system was much criticised by counsel, a prominent argument being that it necessarily introduced inequalities in the valuation of property for taxation, and that by force of its operation such valuation was not made as the Constitution requires, by a uniform rule, but by a multiform rule. And in support of this contention the attention of the court was directed to the fact, which had been established not only by the testimony, but by the report of the State Board of Assessors itself, that although it was the universal practice of the assessors of the different tax districts to rate property much below its real value, the State board had rated this corporate property at its true value. That this discrepancy, arising out of the practical operation of

the methods of valuation, existed, was not disputed. But this result, it is manifest, was not the legal or proper result of the plan of assessment thus introduced by the legislature. That plan provided but one measure of valuation, that is, the true value of the taxable property—and that measure was to be applied alike by the local assessors and the State board; so that, if both sets of officers had performed their duty, there would have obtained that unity of rule that the Constitution demands. The local officers disobeyed the injunction of the law, and the contention is that the State officers should have pursued the same forbidden course, and that their acts should now be declared to be abortive because they refused to perpetuate such a malfeasance. Such an argument, in our estimation, has no force whatever; and, indeed, it seems a novel suggestion that a court should annul a proceeding because such a proceeding conforms to the law.'"

For the reasons stated, and upon the authorities cited, it is respectfully submitted (1) that the decree appealed from should be reversed, with direction to the court below to dismiss appellee's bill, without regard to the merits, for want of jurisdiction, and on the grounds stated in appellants' demurrer thereto; or (2), if the case shall be considered by this court on its merits, the decree appealed from should be reversed, because the appellee has failed to make out a case by that preponderance of competent evidence required by a court of equity to justify interference with the action of State officers in making the assessment of its franchise, and to establish by clear and convincing proof that a systematic and intentional discrimination has been made against it, or that it has been denied the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States, and therefore its bill should be dismissed.

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